# 92-1047

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1992

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Billy W. Lamon, et al., Petitioners

vs.

City of Shawnee, Kansas, Respondent

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Leslie E. Diehl
GOODELL, STRATTON, EDMONDS
& PALMER
515 S. Kansas Avenue
Topeka, Kansas 66603
(913) 233-0593
Counsel of Record

Harold S. Youngentob
GOODELL, STRATTON, EDMONDS
& PALMER
515 S. Kansas Avenue
Topeka, Kansas 66603
(913) 233-0593
Counsel for Petitioners

Petitioners

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## QUESTIONS PRESENTED

1. Whether the "completely relieved from duty" standard set forth at 29 C.F.R. §553.223(b) to be applied in determining entitlement to compensation under the Fair Labor Standards Act, 29 U.S.C. §201, et seq., for meal periods of "tour of duty" law enforcement personnel has a different meaning from the "completely relieved from duty" standard of 29 C.F.R. §785.19.

2. Whether the "completely relieved from duty" standard set forth at 29 C.F.R. §553.223(b) which by its plain language provides that "tour of duty" law enforcement personnel are entitled to compensation for their meal periods unless they are "completely relieved" from all duties, whether active or inactive, while eating, actually means that a police officer must "primarily be engaged in work-related duties during the meal period" to be entitled to compensation therefor.

## LIST OF ALL PARTIES

Petitioners:

Billy W. Lamon

Paul E. Pagacz

Ronald W. Ward

Donald Foltz

Michael G. McCoy

Larry Evans

John England

Mark W. Hein

Franklin K. Sullivan

Mark A. Ashurst

Paul F. Arnold

Terry P. Lawson

Randy A. Peddicord

Thomas F. Carney

Ana Louisa Gamblin, Administrator of the estate of Donald B. Gamblin, Jr., deceased.

Respondent:

City of Shawnee, Kansas.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1992

Billy W. Lamon, et al., Petitioners

vs.

City of Shawnee, Kansas, Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit, entered in the proceedings on August 10, 1992.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on August 10, 1992 in Case Numbers 91-3053, 91-3068, 91-3216 and 91-3217. The Tenth Circuit's decision is reported at 972 F.2d 1145 (10th Cir. 1992). The opinion is set forth in the Appendix at App., p. 1.

The Memorandum and Order of the District Court denying the respondent City's Motion for Summary Judgment in Civil Action Case Number 88-4200-S entered on October 4, 1990 is set forth in the Appendix at App., p. 73. The Verdict of the jury in the trial of Civil Action Case Number 88-4200-S, dated October 22, 1990, is set forth in the Appendix at App., p. 107. The Memorandum and Order of the District Court awarding petitioners damages entered January 4, 1991 in Civil Action Case Number 88-4200-S is set forth in the Appendix at App., p. 114, and is reported at 754 F. Supp. 1518.

## JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 10, 1992.

The Order of the Court of Appeals denying petitioners' timely Petition for Rehearing and Petition for Rehearing en banc was entered September 14, 1992. This Petition for Writ Certiorari is filed herein within ninety (90) days of the Court of Appeals' Order denying the Petition for Rehearing.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

## STATUTES AND REGULATIONS INVOLVED

29 U.S.C. §207(a)(1):

**(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions**

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. §207(k)(1):

**(k) Employment by public agency engaged in fire protection or law enforcement activities**

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection

activities or any employee in law enforcement activities (including security personnel in correctional institutions) if --

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 C.F.R. §785.19(a):

(a) **Bona fide meal periods.** Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (Culkin v. Glenn L. Martin, Nebraska Co., 97 F.Supp. 661 (D. Neb. 1951), aff'd 197 F.2d 981 (C.A. 8, 1952), cert. denied 334 U.S. 866 (1962) rehearing denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc., 93 F.Supp. 213 (E.D. Mich. 1950), aff'd 194 F.2d 493 (C.A. 6, 1952); Biggs v. Joshua Hendy Corp., 183 F.2d 515 (C.A. 9, 1950), 187 F.2d 447 (C.A. 9,

1951); Walling v. Dunbar Transfer and Storage Co., 3 W.H. Cases 284; 7 Labor Cases para 61,565 (W.D. Tenn. 1943); Lofton v. Seneca Coal and Coke Co., 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F.2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); Mitchell v. Tampa Cigar Co., 36 Labor Cases para. 65,198, 14 W.H. Cases 38 (S.D. Fla. 1959); Douglass v. Hurwitz Co., 145 F.Supp. 29, 13 W.H. Cases (E.D. Pa. 1956)).

29 C.F.R. §553.223(b):

(b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests in 29 C.F.R. 785.19 are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

## STATEMENT OF THE CASE

This case involves the question of entitlement of tour of duty law enforcement officers to compensation for their meal periods under the terms of the Fair Labor Standards Act, 29 U.S.C. §201 et seq. (hereinafter "FLSA") and the attendant regulations promulgated by the Department of Labor. At the conclusion of the jury trial in this matter, the District Court instructed the jury as follows regarding the petitioners' entitlement to compensation for meal periods:

> Unless plaintiffs' meal periods are "bona fide" meal periods under the Fair Labor Standards Act, plaintiffs' meal periods are compensable work time. Bona fide meal periods are not work time. To qualify as a bona fide meal period, the employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

App., p. 142, (Instruction No. 10).

Instruction No. 10 is based almost verbatim on 29 C.F.R. §785.19. The jury determined that petitioners were not completely relieved of their duties during meal periods and were entitled to compensation for uncompensated meal periods.

The respondent City appealed, arguing that the District Court erred in instructing the jury, as set forth in Instruction No. 10 above. The Court of Appeals ruled that even though there was sufficient evidence upon which a reasonable factfinder could have returned a verdict for petitioners, Instruction No. 10 did not provide the jury "an ample understanding of the issues and standards of the case" and, therefore, reversed and remanded.

In reversing, the Court of Appeals determined that the District Court erred by

utilizing the language of 29 C.F.R. §785.19 in Instruction No. 10. The Court of Appeals found that even though Part 785 was generally applicable, the District Court should have looked instead to Part 553, and specifically 29 C.F.R. 553.223(b), which pertains to employees of state and local governments compensated under 29 U.S.C. §207(k) as the petitioners were. Section 207(k) permits a law enforcement employer such as the respondent city to pay its police officers a regular wage for the first 171 hours worked in a 28-day period, but then compels an overtime wage for work in excess of 171 hours.

Although 29 C.F.R. §785.19 and 29 C.F.R. §553.223(b) use almost identical words in almost indistinguishable contexts to describe the "completely relieved from duty" standard, in contrasting the two

regulations, the Court of Appeals discussed two differences which it considered important in determining that the completely relieved from duty standard of §553.223(b) was different than that stated in §785.19.

First, the Tenth Circuit stated that §553.223(b) did not include the following sentence from §785.19:

> "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating."

However, §553.223(b), by express reference to §785.19, adopts the completely relieved from duty standard of the regulation "and all the other tests in §785.19". The Tenth Circuit ignored this fact in its decision.

Next, the Court of Appeals found the illustrations contained in §553.223(b) more instructive than those in §785.19(a). The illustrations in §553.223 cite examples of

a meal period being compensable when a law enforcement officer is required to remain in barracks or is assigned to extended surveillance. The Tenth Circuit did not state the significance it attached to the illustrations in §553.223(b).

Based upon these "differences" between §785.19 and §553.223(b), the Court of Appeals ruled that the completely relieved from duty standard of §553.223(b) and §785.19 were different. The Court of Appeals then ruled that what it felt was required by the language of §553.223(b) for entitlement to compensation during meal periods was not complete relief from all duties, but, instead, that a police officer "primarily be engaged in work-related duties" during the meal period. 972 F.2d at 1157.

The facts material to the consideration of the questions presented may be summarized

as follows. Petitioners are 15 current or former patrol officers or shift sergeants serving in the Uniformed Patrol Division of the Shawnee Police Department. The Patrol Division of the Shawnee Police Department operates 24 hours each day in three shifts. Each patrol officer's shift consists of an 8½ hour time span. The 8½ hour time span includes a ½ hour meal period referred to by the parties as "E Call". The number of hours in the normal work day or shift has not changed since any of the petitioners joined the police department of respondent. Since 1977, petitioners have been compensated for eight hours for a work day consisting of 8½ hours. Thus, petitioners have not been compensated for the meal period of ½ hour.

The Chief of Police of the respondent City at the time of trial herein was Chester

A. Hall. Chief Hall was hired as the Deputy Chief of the City police department in October of 1984 and became Chief in April of 1987. The Chief of Police for the respondent City prior to Chief Hall was Charles Stump. Mr. Stump was Chief of Police for the respondent City from the late 1960s until his retirement and Chief Hall's appointment in April of 1987.

Mr. Stump testified that in October of 1985 he requested from Mr. Rainey, the respondent's City Attorney, written advice regarding the application of the FLSA to the police department. That opinion came in the form of a seven page opinion letter dated November 11, 1985 from Mr. Rainey. Among the fourteen different questions responded to by City Attorney Rainey in this opinion letter of November 11, 1985, the following was included:

14. Q. We currently allow an officer 30 minutes for lunch. This is included in his 8 hours of duty time. If during this lunch break he is called to respond, are we obligated?

A. Where the employer has elected to use the 7(k) exemption, meal time cannot be excluded from compensable hours where the employee is on duty for less than 24 hours. (C.F.R. §553.15 Sleeping and Meal Time.) If, however, the 7(k) exception is not elected, bona fide meal periods are not work periods or compensable unless the employee is called to work. (C.F.R. §785.19 Meal.) It is our opinion that because the officer is subject to immediate call during his lunch period, the period is compensable whether the department selects 7(k) or not. The officer is not authorized to leave the City and must be ready to respond. An officer who worked 8 hours and did not take lunch because of required duties would not be compensated time-and-a-half for the lunch period. If he worked 8½ hours and his total hours exceeded the number set for his work period he would receive overtime compensation.

(11/11/85 letter, Appendix at App., p. 143.)

On March 30, 1986, the respondent City adopted Administrative Code No. 2-5 which adopted a 28 day work period and provided for overtime compensation for hours worked in excess of 171 within the 28 day cycle as required by 29 U.S.C. §207(k).

Thomas J. Hayselden, Jr. is the Commander of respondent's Patrol Division and has been since 1989. Prior to that, Captain Hayselden was Commander of Staff Services responsible for payroll and budget. Captain Hayselden stated that a patrol officer's duties are to protect life and property; preserve peace; prevent crime; obey all federal, state and local laws; and maintain an image which reflects favorably for the respondent City. These responsibilities all continue while the officer is on his lunch period. Captain Hayselden stated that police officers must

respond to a crime committed in their presence while at lunch. Captain Hayselden stated police officers cannot use their meal periods for private business such as picking up laundry at the cleaners; getting a haircut; going into a grocery store to shop; or conducting bank business. In fact, Captain Hayselden stated it is still his belief that when a police officer is in uniform during his lunch period, by being in uniform, that time becomes the City's time, not the officer's:

> Q. Page 96, line 7, didn't you in fact testify, "When I feel an officer is going in for bank business, a loan, or something like that, he should do it on his own time, not on my company time. If he's doing it over his lunchtime, then he should do it, you know, on his own, not my uniform, because he represents the department.
>
> "So, is it your feeling by doing it in uniform it becomes your time instead of his time?

Answer: "Yes. That's not becoming a professional office." Did you so testify?

A. Yes.

Q. And is that still your belief, sir?

A. Yes, it is.

(App., p. 145.)

Captain Hayselden stated that police officers while at lunch have a duty to respond at all times, whether an emergency or not, to other officers and supervisors. During meal periods, the police officers must also be available by telephone or monitor a portable radio because they remain on call. Failure to respond to an emergency call could result in discipline. These "emergency calls" would include calls to officers at lunch to leave lunch because of manpower shortages and normal injury accidents.

Times for police officers to eat are assigned at a preshift briefing. However, it is not unusual for those times to be changed during the shift because of police calls and manpower needs. Because of this fact, police officers customarily miss previously scheduled appointments over their lunch periods. It is Captain Hayselden's practice to only allow one officer to eat at a restaurant at a time. Finally, even though Captain Hayselden and Chief Hall expect police officers to courteously respond to citizens' questions at lunch, Captain Hayselden would reject an overtime request from an officer for this time.

Chester Hall has been the Chief of the respondent Police Department since April 1987 and was Deputy Chief from October 1984 up to that date. Chief Hall stated that police officers retain responsibilities

during their meal periods to respond to requests of citizens and to respond to crimes committed. The officers must eat at restaurants within the city or within one-half mile outside. Officers cannot use a private vehicle at lunch without permission. Chief Hall admitted the respondent City receives a benefit from a public relations viewpoint from officers being out in public in uniform during their lunch periods observing and being observed.

Petitioners must remain in uniform in public view. Petitioners work on reports during lunch periods and their supervisors have seen it and said nothing. This is because there is not the time or facilities on the streets to properly fill these out. In fact, some police officers have been told by supervisors their lunch periods are time they "give to the City".

The basis for jurisdiction in the United States District Court for the District of Kansas was pursuant to 29 U.S.C. §216(b) and 28 U.S.C. §§ 1331 and 1337 pertaining to civil actions arising under an Act of Congress regulating commerce.

## REASONS FOR ALLOWANCE OF THE WRIT

1. In determining that merely because an employee is paid pursuant to a 29 U.S.C. §207(k) tour of duty work procedure, the meaning of the "completely relieved from duty" standard of 29 C.F.R. §553.223(b) is thereby different from the "completely relieved from duty" standard stated in 29 C.F.R. §785.19, the Court of Appeals for the Tenth Circuit has taken a position in direct conflict with the position stated by the Court of Appeals for the Eleventh Circuit in the case of Kohlheim v. Glynn County, Ga., 915 F.2d 1473, 1477 (11th Cir. 1990).

2. In determining that petitioners must be "primarily engaged" in work-related duties to be entitled to compensation for their meal periods instead of engaged in "any" duties related to their work as stated in 29 C.F.R. §553.223(b) and 29 C.F.R.

§785.19, the Court of Appeals for the Tenth Circuit has taken a position in direct conflict with the following decisions of the following circuits:

> Kohlheim v. Glynn County, Ga., 915 F.2d 1473 (11th Cir. 1990; Culkin v. Glenn L. Martin Nebraska Co., 97 F.Supp. 661 (D.Nebr. 1951) aff'd. 197 F.2d 981 (8th Cir. 1952) cert. denied, 344 U.S. 888 (1952); Donovan v. Grantham, 690 F.2d 453 (5th Cir. 1982); Brennan v. Elmer's Disposal Service, Inc., 510 F.2d 814 (9th Cir. 1975); Donovan v. Bel-Loc Diner, 780 F.2d 1113 (4th Cir. 1985); Mumbower v. Callicott, 526 F.2d 1183 (8th Cir. 1975); Dole v. Solid Waste Services, Inc., 733 F.Supp. 895 (E.D. Pa. 1989) aff'd without opinion, 897 F.2d at 521 (3rd Cir. 1990).

3. The question of the compensability of meal periods under the FLSA is an important question of federal law which has not been, but should be, settled by this Court.

## ARGUMENT

### A. The Tenth Circuit's Interpretation of the Completely Relieved From Duty Standard of §553.223(b) as Being Different From the Completely Relieved From Duty Standard in §785.19 Conflicts with a Decision of Another Circuit and the Plain Language of the Regulations Themselves.

The Court of Appeals in this case ruled that the District Court's jury instruction which literally applied the completely relieved from duty standard set forth in 29 C.F.R. §785.19 deprived the jury of an ample understanding of the issues and standards of the case. The Court of Appeals ruled that the District Court should have looked to 29 C.F.R. §553.223(b), which it believed controlled the question of compensability of meal periods in the context of employees, such as the petitioners, working tours of duty pursuant to 29 U.S.C. §207(k).

The Tenth Circuit stated two "differences" between §553.223(b) and

§785.19, which it felt supported this position. As will be shown, these distinctions are merely perceived and do not exist in a legal context.

The first perceived distinction noted by the Tenth Circuit is that §553.223(b) does not include the following specific sentence from §785.19: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." The Tenth Circuit believed this distinction important even though §553.223(b) expressly adopts not only the completely relieved from duty standard of §785.19, but also all the other tests contained in §785.19, including the active or inactive duty test stated above. See 29 C.F.R. §553.223(b).

This perceived distinction relied upon by the Tenth Circuit was specifically

rejected by the Eleventh Circuit in Kohlheim v. Glynn County, Ga., 915 F.2d 1473 (11th Cir. 1990). In Kohlheim, the plaintiffs were firefighters working tours of duty pursuant to 29 U.S.C. §207(k). The district court had ruled that the firefighters were entitled to compensation for their meal periods under the standard set forth at §785.19. The district court reasoned that since the firefighters were required to remain at the station and were subject to emergency calls during their meal periods, their work duties continued during this time, entitling them to compensation under §785.19.

On appeal to the Eleventh Circuit, the defendant, Glynn County, argued that since the firefighters were tour of duty employees it was error for the district court to apply the completely relieved from duty standards

and attendant tests contained in §785.19 instead of those contained in §553.223(b). The Court of Appeals ruled that since §553.223(b) expressly incorporated the tests of §785.19, it was prudent to apply the completely relieved from duty standard and all other tests stated in §785.19 to tour of duty situations. The Eleventh Circuit stated:

> The tour of duty concept should not relieve the employer from its responsibility of compensating employees for worktime. It is undisputed that the county received substantial benefits from the firefighters' activities during the mealtime periods, and such activities create a right of compensation under the FLSA. The regulations set forth in §785.19(a) offer a useful and fair standard by which to determine whether a meal period should be considered worktime under the FLSA, and should not be disregarded in tour of duty work arrangements.

915 F.2d at 1477. See also Id. n. 20 at 1477-1478 (". . . we join the other circuits

which have adopted the mealtime exclusion standards of §785.19 as an appropriate statement of the law.").

This position of the Eleventh Circuit is in direct conflict with the Court of Appeals' decision herein.

The Tenth Circuit also found significant the illustrations set forth in §553.223(b) which include a meal period being compensable when a police officer is forced to remain on call in barracks or is assigned to surveillance. The Court of Appeals does not explain why these illustrations are more significant than those contained in §785.19. However, the Court of Appeals cites the cases of Lee v. Coahoma County, Miss., 937 F.2d 220 (5th Cir. 1991) and Leahy v. City of Chicago, 785 F.Supp. 724 (N.D. Ill. 1992) after discussing these illustrations.

In Lee, the Fifth Circuit did state that the facts before it did not "resemble this example" in reference to §553.223(b). See Lee, 937 F.2d at 225. In Leahy, the district court noted that the illustrations of the two regulations were "radically different". See Leahy, 785 F.Supp. at 727. However, as noted by Judge Crow in the case of Brinkman, et al. v. The Department of Corrections of the State of Kansas, No. 91-4208-C (D.Kan. Sept. 14, 1992) (attached hereto at App., p. 147) these courts have all read too much into the illustrations of the regulations:

> The courts in Lee, Leahy, and Lamon seem to read into the illustration of §553.223(b) that the employee must be performing the same or similar kind of substantial duties over the meal period before compensation is due. These courts have attached more significance to the illustrations than was intended apparently by the Department of Labor. For at 29 C.F.R. §785.1, it states:

> The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted.
>
> At best, the example at §553.223(b) illustrates a common situation for §207(k) employees and does not suggest a different meaning for the "completely relieved from duty" standard.

Brinkman, et al. v. The Department of Corrections of the State of Kansas, No. 91-4208-C, Slip. Op. at 19-20, attached hereto at App., pp. 180-181.

The District Court of Kansas in the Brinkman case then went on to determine that the two "differences" relied upon herein by the Court of Appeals in an attempt to

distinguish the requirements of §553.223(b) and §785.19 were "insubstantial" and that the meanings of the two regulations were the same. Even though the District Court in Brinkman applied the standard as articulated by the Tenth Circuit as it was compelled to do, it questioned the Tenth Circuit's reasoning:

> This court believes Lamon strongly implies that the "completely relieved from duty" standard appearing in both §553.223(b) and §785.19 has the same meaning. The two distinctions observed between §553.223(b) and §785.19 are insubstantial reasons for reading identical words differently in almost indistinguishable contexts. No rationale for having a less rigorous meal period standard for an employee covered under §207(k) is offered in Lamon. Section 207(k) obviously is intended to address the unique employment circumstances of a law enforcement officer, firefighter, or corrections officer. Presumably, the same circumstances justify taking the same approach to meal period times for those similarly

> employed whether covered by §207(k) or not. The court feels compelled to apply the standards articulated in Lamon to this case.

Brinkman, supra, Slip. Op. at 22, attached hereto at App., pp. 185-86.

As troubled the Court in Brinkman, the clear language of §553.223(b) expressly incorporating all of the tests of §785.19 cannot be set aside without a clear legal basis. Administrative regulations adopted pursuant to the FLSA "are entitled to great weight and should not lightly be set aside". Mitchell v. Greinetz, 235 F.2d 621, 625 (10th Cir. 1956). The Tenth Circuit has stated that such regulations, being the interpretation of the FLSA by the Department of Labor, which is charged with the administration of the FLSA, should not be disregarded unless "clearly erroneous". Id. While "not controlling upon the courts by

reason of their authority", the FLSA regulations serve as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance". Skidmore v. Swift, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124, 129 (1944). These regulations, being the Department of Labor's own interpretations of the FLSA, "are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case". Id.

Furthermore, the FLSA is to be liberally interpreted in favor of employee coverage. The FLSA was adopted by Congress as remedial and humanitarian legislation and, consequently, "must be liberally construed 'to apply to the furthest reaches consistent with congressional direction'".

Hodgson v. University Club Tower, Inc., 446 F.2d 745, 746 (10th Cir. 1972).

The ruling of the Court of Appeals herein is clearly in direct conflict with these rules of interpretation. It narrows rather than broadens the interpretation of the plain language of §553.223(b). The Court of Appeals' interpretation eliminates compensation to the petitioners for their meal periods although there is no dispute that the City benefits from the restrictions placed on the petitioners during their lunch. The Tenth Circuit has created a confusing and unsupportable precedent.

**B. In Determining that Petitioners Must be "Primarily Engaged" in Work-Related Duties to be Entitled to Compensation For Their Meal Periods Instead of Engaged in "Any" Duties Related to Their Work as Stated in 29 C.F.R. §553.223(b) and 29 C.F.R. §785.19, the Court of Appeals For the Tenth Circuit Has Taken A Position in Direct Conflict With Other Circuits.**

In rendering its decision herein, the Tenth Circuit chose to ignore the Eleventh

Circuit's decision in Kohlheim v. Glynn County, Ga., 915 F.2d 1473 (11th Cir. 1990), although it was one of the primary authorities relied upon by petitioners. The Tenth Circuit obviously ignored the Eleventh Circuit's opinion in Kohlheim because it could not be reconciled with its own decision.

In Kohlheim, the defendant employer was a §207(k) employer employing "tour of duty" employees. The question therein was whether plaintiffs, public firefighters, were entitled to compensation for their meal periods. The facts set forth by the Court of Appeals in Kohlheim indicate that the firefighters were required to remain at the fire station and were subject to emergency calls during their meal periods. The firefighters were also subject to restrictions on their activities during the

meal periods, which the Eleventh Circuit noted benefitted the County by "ensuring maintenance of an available pool of competent firefighters for immediate response to emergency situations." 915 F.2d at 1477. The Court of Appeals in Kohlheim ruled that since the firefighters were subject to real limitations on their freedom during their meal periods which inured to the benefit of the County, the meal periods were compensable under §785.19.

In ruling that the firefighters were entitled to compensation for their meal periods, the Eleventh Circuit noted that the applicable provision for determining compensation of the firefighters was 29 C.F.R. §553.223(d), which provides:

> (d) In the case of police officers or firefighters who are on a tour of duty of more than 24 hours, meal time may be excluded from compensable hours of work provided that the tests in 29 C.F.R. §785.19 and §785.22 are met.

Like 29 C.F.R. §553.223(b), this regulation incorporates the tests of 29 C.F.R. §785.19. The Eleventh Circuit recognized, as the Tenth Circuit herein failed to do, that this meant all of the tests of 29 C.F.R. §785.19 must be met, including that the employees be relieved from all duties, whether active or inactive, to avoid compensation. The Eleventh Circuit stated:

> Section 785.19 provides that bona fide meal periods are not worktime. In order to be considered a bona fide meal period, however, the regulations require complete relief from duty: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." Thus, the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period is whether the employees are in fact relieved from work for the purpose of eating a regularly scheduled meal. The district court ruled

> that the firefighters were not completely relieved of their duties during mealtimes and we find no error in this conclusion.

915 F.2d at 1477.

Though "work" is not defined in the FLSA, the term includes duties that are an "integral and indispensable part" of the employee's principle work activity. Steiner v. Mitchell, 350 U.S. 247, 256 (1956); 29 C.F.R. §§ 785.24, 785.25. Additionally, this Court has noted that "work" may be doing nothing: "Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen." Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944). Moreover:

> Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer.

Id. As determined by the Eleventh Circuit in Kohlheim, and as stated by this Court, time spent by the employee for the benefit of the employer is compensable time. See, e.g., Handler v. Thrasher, 191 F.2d 120, 122-23 (10th Cir. 1951) (citing Skidmore v. Swift & Co., 323 U.S. 134, 138 (1944)). Consequently, the notion of "work" and "compensable hours worked" have broad meanings under the FLSA. The Tenth Circuit has even recognized this by allowing compensation to firefighters who do nothing more than wait for emergencies to occur reasoning this creates a benefit to the employer which is compensable under the FLSA. See Renfro v. City of Emporia, Kan., 948 F.2d 1529, 1538 (10th Cir. 1991).

In the instant case, both the Chief of Police and the Commander of the Patrol Division of the respondent City testified as

to the real restrictions placed upon petitioners during their meal periods. The Patrol Commander testified he considers the petitioners' meal periods to be the City's time and not the police officers' time since the petitioners are in uniform and subject to the attendant restrictions. The Chief of Police, Chester Hall, admitted that the City receives a benefit having the police officers in uniform during meal periods, observing and being observed by the public. It is clear that under the standard of §785.19 applied by the Eleventh Circuit in Kohlheim, the petitioners were entitled to compensation for their meal periods. The decisions of the Eleventh Circuit and the Tenth Circuit directly conflict.

Since it is clear that the "completely relieved from duty" standard appearing in both §553.223(b) and §785.19 have the same

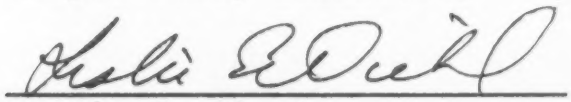
meaning, the Tenth Circuit's opinion is equally in conflict with those Circuits which have literally interpreted §785.19 to require compensation for meal periods to non-tour of duty employees if the employees perform any work related duties during their meal periods. The Tenth Circuit's decision thus conflicts with the decisions of the following Circuits: Donovan v. Bel-Loc Diner, Inc., 780 F.2d 1113, 1115-1116 n.1 (4th Cir. 1985) (affirming that the meal breaks were not "bona fide" meal breaks because they were not uninterrupted and the employee was not completely relieved from duty); Donovan v. Grantham, 690 F.2d 453, 457 (5th Cir. 1982) (holding that employers cannot dock breaks when employee must continue with any duties); Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir. 1975) (applying "completely relieved from

duty" standard to meal periods of switchboard operator under 29 C.F.R. §785.19); Brennan v. Elmer's Disposal Service, Inc., 510 F.2d 84, 88 (9th Cir. 1975) (applying 29 C.F.R. §785.19 and holding lunch breaks compensable if employee "is required to continue with any duties related to his work" (emphasis added)); Dole v. Solid Waste Services, Inc., 733 F.Supp. 895, 924 (E.D. Pa. 1989), aff'd without opinion, 897 F.2d 521 (3rd Cir. 1990) (applying 29 C.F.R. §785.19 as argued by the Secretary of Labor, holding that "employee must be completely relief from duty").

## CONCLUSION

For these various reasons, this Petition for Certiorari should be granted and a Writ of Certiorari should issue to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,



Leslie E. Diehl
GOODELL, STRATTON, EDMONDS
& PALMER
515 S. Kansas Avenue
Topeka, Kansas 66603
(913) 233-0593
Counsel of Record

Harold S. Youngentob
GOODELL, STRATTON, EDMONDS
& PALMER
515 S. Kansas Avenue
Topeka, Kansas 66603
(913) 233-0593
Counsel for Petitioners

## APPENDIX

**Description**

Opinions, Judgments and Determination Letters


1. Opinion of the Tenth Circuit Court of Appeals . . . . A-1

2. Memorandum and Order of U.S. District Court for the District of Kansas . . . . A-68

3. Jury Verdict Form . . . . . A-107

4. Memorandum and Order . . . . A-109

5. Instruction No. 10 . . . . A-142

6. Memorandum and Order . . . . A-147

7. Order of U.S. Court of Appeals for the Tenth Circuit . . . A-198

Letter of Nov. 11, 1985 . . . . A-143

Transcript Exerpts . . . . . A-145

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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| BILLY W. LAMON, PAUL E. PAGACZ, RONALD W. WARD, DONALD FOLTZ, MICHAEL G. McCOY, LARRY EVANS, JOHN ENGLAND, MARK W. HEIN, FRANKLIN K. SULLIVAN, MARK A. ASHURST, PAUL F. ARNOLD, TERRY P. LAWSON, RANDY A. PEDDICORD, THOMAS F. CARNEY, and ANA LOUISA GAMBLIN, administrator of the estate of Donald B. Gamblin, Jr., deceased, | ) | |
| Plaintiffs-Appellants and Cross-Appellees, | ) | Nos. 91-3053<br>91-3068<br>91-3216<br>91-3217 |
| vs. | ) | |
| CITY OF SHAWNEE, KANSAS, | ) | |
| Defendant-Appellee and Cross-Appellant, | ) | |
| NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, | ) | |
| Amicus Curiae, | ) | |
| LEAGUE OF KANSAS MUNICIPALITIES, | ) | |
| Amicus Curiae, | ) | |

STATE OF KANSAS,

Amicus Curiae,

GRAND LODGE, FRATERNAL ORDER OF POLICE,

Amicus Curiae.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. NO. 88-4200-S)

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Harold S. Youngentob, Goodell, Stratton, Edmonds & Palmer, Topeka, Kansas (Les E. Diehl, Goodell, Stratton, Edmonds & Palmer, Topeka, Kansas, with him on the brief) for Plaintiffs-Appellants/Cross-Appellees.

Marvin E. Rainey, Marvin E. Rainey & Associates, Overland Park, Kansas (Eric R. Arner, Marvin E. Rainey & Associates, Overland Park, Kansas, with him on the brief) for Defendant-Appellee/Cross-Appellant.

James D. Conkright and Jana V. Richards, Blackwell Sanders Matheny Weary & Lombardi, Overland Park, Kansas, by brief for Amicus Curiae National Institute of Municipal Law Officers in support of Defendant-Appellee/Cross-Appellant.

James M. Kaup and Michael M. Schultz by brief for Amicus Curiae League of Kansas Municipalities in support of Defendant-Appellee/Cross-Appellant.

Robert T. Stephan, Attorney General, and Carl A. Gallagher, Assistant Attorney General, by brief for Amicus Curiae State of Kansas in support of Defendant-Appellee/Cross-Appellant.

James E. Phillips, G. Ross Bridgman and Allen S. Kinzer, Vorys, Sater, Seymour and Pease, Columbus, Ohio, by brief for Amicus Curiae Grand Lodge, Fraternal Order of Police in support of Plaintiffs-Appellants/Cross-Appellees.

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Before BALDOCK and BARRETT, Circuit Judges, and PARKER*, District Judge.

PARKER, District Judge.

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* The Honorable James A. Parker, Judge, United States District Court for the District of New Mexico, sitting by designation.

Appendix to Brief of Appellants, exh. A). Plaintiffs alleged that the City violated FLSA's compensation provisions by failing to pay Plaintiffs for meal periods occurring during work shifts and for failing to compensate those Plaintiffs working as supervisors ("supervisory Plaintiffs")[2] for the time necessary to prepare for the daily pre-shift briefings. (R., Appendix to Brief of Appellants, exh. A & C). These issues were tried to a jury, which returned a verdict in favor of Plaintiffs on the question of compensability of meal periods but against the six supervisory Plaintiffs seeking compensation for preparation time.[3]

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[3]The jury also found Plaintiffs were not entitled to recover under their implied contract claims, and did not consider the state statutory claim.

[2]Those Plaintiffs are Billy W. Lamon, Paul E. Pagacz, Ronald W. Ward, Randy A. Peddicord, Michael G. McCoy and Mark A. Ashurst.

Plaintiffs-Appellants ("Plaintiffs"), fifteen current and former police officers and sergeants of the City of Shawnee Police Department, brought this action in district court against Defendant-Appellee City of Shawnee ("Defendant" or "City"), asserting violations of the Fair Labor Standards Act of 1938 ("FLSA" or "the Act"), § 1 et seq., as amended, 29 U.S.C. § 201 et seq.[1] (R.,

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[1]Plaintiffs also asserted claims under the Kansas Minimum Wage and Maximum Hour laws, Kan. Stat. Ann. § 44-1201 et seq., and under a common-law theory of implied contract of employment. Neither of these claims is at issue on appeal. (R., Appendix to Brief to Appellants, exh. A).

Based on the jury's further finding that the City had established a 28-day work period in accordance with FLSA, the district court by subsequent memorandum and order awarded compensatory and liquidated damages, attorneys' fees and costs to Plaintiffs. The central questions[4] raised by the

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[4]Plaintiffs raise six issues on appeal: (1) whether the district court erred as a matter of law in denying Plaintiffs' renewed motion for summary judgment or directed verdict on the issue of Defendant's failure to establish a bona fide 28-day/171-hour work period under § 207(k) of FLSA; (2) whether there was substantial competent evidence to support the jury's determination that the Defendant did establish a bona fide 28-day/171-hour work period under § 207(k) of the FLSA; (3) whether the court erred in not allowing a read-back to the jury of Chief Hall's and Captain Hayselden's testimony; (4) whether the district court erred in instructing the jury as to Defendant's burden of proof on the issue of whether Defendant established a bona fide 28-day/171-hour work period; (5) whether the district court erred in instructing

parties on cross-appeal are (1) whether the evidence supported a finding that the City established a 28-day work period under FLSA, thereby making available to the City a more lenient overtime standard under the Act, (2) whether the district court erred in calculating the rate at which Plaintiffs should be compensated for meal periods, if those periods are compensable, (3) whether the trial court erred in not directing a verdict for Defendant and in instructing the jury on the compensability claims for meal periods, (4) whether the jury's

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the jury on the establishment of a 28-day/171-hour work period by not including the requirement that a specified number of minimum hours in excess of which overtime will be paid must also be established; and, (6) whether there was substantial competent evidence to support the jury's verdict that the supervisory Plaintiffs were not working when preparing for the pre-shift briefing. Defendant raises five issues on appeal: (1) whether the district court erred in instructing the jury as to the applicable standard for

determination that the supervisory Plaintiffs were not entitled to recover for time spent prior to pre-shift briefings was supported by substantial evidence, and (5) whether the trial court properly awarded liquidated damages and attorneys' fees. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

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determining whether the meal periods of the Plaintiffs were compensable work time within the meaning of FLSA; (2) whether the district court erred in not directing a verdict for Defendant finding that the meal periods of Plaintiffs were not compensable work time within the meaning of FLSA; (3) whether the district court erred in holding that FLSA required payment to Plaintiffs of their regular rate of pay for non-overtime hours worked; (4) whether the district court erred in awarding liquidated damages by not finding that the actions of Defendant were in good faith and that it had reasonable grounds for believing that its actions were not in violation of FLSA; and, (5) whether the district court erred in failing to employ the articulated step-by-step analysis as adopted by the Tenth Circuit to determine an appropriate award of attorneys' fees.

## I. BACKGROUND

This dispute arises out of the City's promulgation of new compensation policies for the City's Police Department. The requirements of FLSA became applicable to state and local government employers on April 15, 1986, as mandated by Congress in its 1985 amendments to FLSA. Federal Labor Standards Amendments of 1985, Pub. L. No. 99-150 (1985). In anticipation of the new requirements, specifically pursuant to § 207(k) of FLSA, the City adopted

Administrative Code No. 2-5, effective March 30, 1986, setting forth a 28-day work period and providing for overtime payment for hours worked in excess of 171 hours within the 28-day cycle. (R., Answer Brief of Appellee, exh. B). During a 28-day cycle, each police officer works 20 shifts and is paid twice, once every 14 days. (R., Appellee's Supplemental Appendix, exh. G at 519). Every 24-hour day is divided into three slightly overlapping shifts, each of 8 1/2 hours in duration, consisting of a 15-minute briefing period before patrol duty, a 30-minute lunch break, and a final 15-minute period to complete reports and turn in equipment, with the remaining time allocated to patrol duty. (R., Appellee's Supplemental Appendix, exh. G at 90-95, 122, & 340). However, for each 8 1/2 hour shift, the City pays for 8 hours of work, not

compensating for an officer's meal period unless the meal period is interrupted by a call to duty. Although the City's compensation policies only require overtime compensation for work in excess of 171 hours during the cycle, the City has abided by the practice of paying overtime for all work, excluding uninterrupted meal periods, in excess of forty hours per week, or 160 hours per 28 days. (R., Appellee's Supplemental Appendix, exh. G at 522-24). The City has compensated, at an overtime wage of time and one-half, any officer called to duty during a meal period. (R., Appellee's Supplemental Appendix, exh. G at 85).

An officer's 1/2-hour meal period begins once the officer arrives at a luncheon location and reports "10-10" to the dispatcher, signifying the suspension of patrol duty. (R., Appellee's Supplemental

Appendix, exh. G at 130). During meal periods, officers are relieved of their patrol assignments, but are subject to call and are required to leave a telephone number where they can be reached or to monitor a portable radio. (R., Appellee's Supplemental Appendix, exh. G at 797 & 800). While on meal break, an officer must respond to emergency calls or personnel shortages if instructed to do so. (R., Appendix to Appellants' Answer Brief, exh. 2 at 74, 96-97 & 368). An officer is relieved of patrol duties during meal time but retains some responsibilities, including: responding to citizen requests or inquiries, responding to crimes committed in the officer's presence and acting in a responsible and professional manner. (R., Appendix to Appellants' Answer Brief, exh. 1 at 808-09). Officers may take their meal periods at any location within

the City or, with approval, outside the City at their homes or at restaurants if in close proximity to the City. (R., Appendix to Appellants' Answer Brief, exh. 1 at 811-12). The officers may not conduct personal business errands during the 1/2-hour period, such as picking up laundry at the cleaners, getting a haircut or grocery shopping. (R., Appendix to Appellants' Answer Brief, exh. 1 at 69).

Plaintiffs filed their Complaint on August 23, 1988. After denying the parties' cross-motions for summary judgment on the FLSA, Kansas labor act and implied contract claims by a memorandum and order entered October 4, 1990, the court set the question of liability for jury trial.[5] On October 22, 1990, the jury returned its verdict,

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[5]The court's memorandum and order, entered July 10, 1990, granted Defendant's motion to bifurcate the issues of liability and damages.

finding the City liable on the mealtime claim. Thereafter, the parties briefed the correlating damages issue. In a memorandum and order of January 4, 1991, the court awarded damages, attorneys' fees and costs to Plaintiffs and denied Defendant's motion for new trial, to amend or vacate the verdict, or for judgment notwithstanding the verdict. Lamon v. City of Shawnee, 754 F. Supp. 1518 (D. Kan. 1991). The court reasoned that the jury's finding of a 28-day work period partially released the City from paying overtime compensation. In short, Plaintiffs were entitled to be paid no more than their regular wage for hours worked over 160 and up through 171 hours and to be paid overtime for hours worked above 171 hours. Because the Plaintiffs took no more than ten hours in meal periods within a 28-day period, the court determined that the

compensation due, however, would be calculated at the regular hourly rate. Id. Consistent therewith, the court awarded Plaintiffs $90,614.37 in actual damages and an equal amount in liquidated damages, plus attorneys' fees and costs. Id. Finally, by memorandum and order of May 10, 1991, the court denied Defendant's motion to alter or amend the damages, fees and costs award.

## II. DISCUSSION

With the passage of FLSA in 1938, Congress established a comprehensive remedial scheme requiring a minimum wage and limiting the maximum number of hours worked, absent payment of an overtime wage for all hours worked in excess of the specified maximum number. At its inception, FLSA did not apply to state and local governments. In 1974, Congress extended FLSA's reach to virtually all state and local government

employees. FLSA Amendments of 1974, 29 U.S.C. § 203(d) and (x). See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 533, 105 S. Ct. 1005, 1008, 83 L.Ed.2d 1016 (1985). But, in 1976, the Supreme Court invalidated FLSA's extension to state and local governments when those entities were performing traditional governmental functions, including the provision of police protection, ruling in National League of Cities v. Usery, 426 U.S. 833, 851-52, 96 S. Ct. 2465, 2474, 49 L.Ed.2d 245 (1976), that Congress' authority under the Commerce Clause was not so broad. See Wethington v. City of Montgomery, 935 F.2d 222, 224 (11th Cir. 1991). Turning full circle and bringing FLSA essentially to its present posture, the Court's 1985 opinion in Garcia overruled the holding in National League of Cities, leaving the states and cities

subject once again to the full thrust of FLSA. Garcia, 469 U.S. at 556-57, 105 S. Ct. at 1020. Because of the difficulty posed to state and local employers by the sudden resurrection of the Act, Congress delayed until April 15, 1986, the Act's application to state and local governments. Federal Labor Standards Amendments of 1985, Pub. L. No. 99-150 (1985).

The backbone provisions of FLSA are its minimum wage and overtime requirements. FLSA's principal provision compelling the payment of an overtime wage for hours worked above a maximum hour threshold is § 207(a):

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives

> compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1). Although a state or local government, in its employment of law enforcement or fire protection personnel, may chose to conform to the maximum hour and overtime provisions contained in § 207(a)(1), the governmental entity may adopt an alternative scheme available under § 207(k). In enacting the FLSA Amendments of 1974, "Congress recognized that certain jobs are not easily susceptible to the workweek method of wage and time calculations, and therefore provided special calculation methods for some trades, including fire protection and law enforcement." Wethington, 935 F.2d at 224 (citing § 207(k)). Raising the regular rate ceiling, a § 207(k) provides:

No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities . . . if--

> (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days. . .; or
>
> (2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of

> consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,
>
> compensation at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(k). Pursuant to 29 C.F.R. § 553.201, the Secretary of Labor has established that 171 hours is the maximum number of hours a law enforcement officer may work in a work period of 28 days before the officer must be paid an overtime wage. See 29 C.F.R. § 553.230. Accordingly, in a 28-day period, § 207(k) permits a law enforcement employer to pay its police officers a regular wage for the first 171 hours worked, but then compels an overtime wage for work in excess of 171 hours. The number of hours at the regular and overtime

wage rates for periods of fewer than 28 days would be calculated applying the same proportion, as explained in 29 C.F.R. § 553.230. See Lee v. Coahoma County, 937 F.2d 220, 224 (5th Cir. 1991).

**A. Establishment of bona fide 28-day work period under § 207(k) of FLSA.**

The first question we must consider centers on the factual basis supporting the City's implementation of a 28-day work period under FLSA. Plaintiffs contend that although the City may have adopted a work regime pursuant to § 207(k) on paper, the program was never put into effect, consequently making that subsection's provisions unavailable to the City. The district court encountered this question at several stages in the litigation: (1) the court rejected this contention prior to trial in its memorandum and order, filed on

October 4, 1990, and during trial, when it denied Plaintiffs' oral motions for directed verdict; (2) at the close of the evidence, the court instructed the jury on the standard and elements necessary to find the City had established a 28-day regime; and, (3) after deliberation, the jury found that Defendant had established a 28-day work period. Plaintiffs claim error in each of these steps in the proceedings.[6]

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[6]This question is raised principally by Plaintiffs' stated appeal issues nos. 1 through 5.

1. The Court did not err in submitting the issue of the establishment of a 28-day work period to the jury.

Plaintiffs maintain that the district court erred as a matter of law in denying Plaintiffs' renewed motion for summary judgment or directed verdict on the issue of Defendant's failure to establish a bona fide 28-day/171-hour work period under § 207(k) of the Fair Labor Standards Act. A party moving for directed verdict does not have to show the absence of any evidence in support of the party opposing the motion. Instead, either at trial or upon review, the standard is whether there is evidence upon which the jury could properly find a verdict for the party opposing the motion, viewing the evidence most favorably and giving the benefit of all reasonable inferences from the evidence to that party. Brown v.

McGraw-Edison Co., 736 F.2d 609, 612-13 (10th Cir. 1984). "The court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury." Id. at 613 (citing Yazzie v. Sullivent, 561 F.2d 183, 188 (10th Cir. 1977). For a reviewing court to find error in a trial judge's denial of a motion for directed verdict, "we must find that the 'evidence points but one way and is susceptible to no reasonable inference supporting the party [opposing the motion.]'" Boehm v. Kansas City Power and Light Co., 868 F.2d 1182, 1185 (10th Cir. 1989) (quoting Zimmerman v. First Federal Sav. & Loan Ass'n., 848 F.2d 1047, 1051 (10th Cir. 1988)).

Plaintiffs argue that the evidence does not show that the City established a bona fide work period under § 207(k), because the

compensation and scheduling practices under the new system were no different from those in effect before March 30, 1986, and, therefore, no different from the standard 40-hours workweek governed by § 207(a). Despite the institution of a 28-day work period under Administrative Code No. 2-5, the City continued to pay its law enforcement personnel every two weeks and to pay overtime for hours worked in excess of 40 hours per week. Based on those facts, Plaintiffs contend that the City did not properly convert to a subsection (k) regime. Plaintiffs, however, fail to cite and this court is unaware of any authority supporting the contention that an employer, once having elected the subsection (k) option, must structure pay periods to be co-extensive with the chosen work period and may pay overtime only for hours worked beyond the

legal maximum permitted at the regular wage. Indeed, this contention flies in the face of the federal regulations promulgated under FLSA.[7] Part 553 of Title 29 of the Code of

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[7]This court has recognized that the administrative regulations adopted pursuant to FLSA "are entitled to great weight and should not lightly be set aside." Mitchell v. Greinetz, 235 F.2d 621, 625 (10th Cir. 1956). FLSA regulations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944). See Hill v. United States, 751 F.2d 810, 813 (6th Cir. 1984), cert. denied Cummings v. United States, 474 U.S. 817, 106 S. Ct. 63, 88 L.Ed.2d 51 (1985).

Federal Regulations applies FLSA to employees of state and local governments. Section 553.224 defines "work period" as used in subsection (k):

> (a) As used in section 7(k), the term 'work period' refers to any established and regularly recurring period of work which, under the terms of the Act and legislative history, cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation, the work period can be of any length, and it need not coincide with the duty cycle or pay period . . . . The beginning and ending of the work period may be changed, provided that the change is intended to be permanent and is not designed to evade the overtime compensation requirements of the Act.

29 C.F.R. § 553.224(a). This provision explicitly allows pay periods to vary from work periods and makes no mention of a requirement that overtime wage rates be paid only for hours exceeding 171 in a work period.

Other than adopting a specified work period, the employer is not required to restructure its overtime payment practices whatsoever; the employer has the option to do so.[8] The evidence was uncontroverted

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[8]If an employer chooses not to avail itself of the advantages available under the subsection, that does not mean its selection of the alternative regime did not really occur, as Plaintiff would have this court hold. Such an argument founders, for it is buoyed by the untenable notion that the City does not possess any rights under subsection (k) until those rights are exercised.

that the City adopted Administrative Code No. 2-5, setting forth the City's § 207(k) employment policy. Following therefrom, the jury properly could have found that the Defendant had established the alternative regime simply by the measure's adoption. That the measure affected little change does not render it a fiction.

Of course, an employer may not impose sham changes in its employment scheduling and compensation policies so as to evade the Act. See Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42, 65 S. Ct. 11, 89 L. Ed. 29 (1944). Plaintiffs charge that by instituting a subsection (k) regime, the City was merely paying lip service to FLSA, seeking only to circumvent FLSA's overtime compensation requirements. Plaintiffs cite International Asso. of Firefighters, Local 349 v. City of Rome, 682 F. Supp. 522, 527

(N.D. Ga. 1988), for the proposition that a municipality must make bona fide schedule changes and may not reconstitute work hours and periods as a subterfuge or artificial device designed to avoid illegally the overtime provisions of FLSA. In Rome, the city extended by 15 minutes the 24-hour shift previously in effect for its firefighters in order to take advantage of subsection (k)'s exclusion of sleep time from compensated hours worked in a tour of duty in excess of 24 hours. The city admitted that its purpose in making the change was to reduce the compensable time by eight hours per shift so as to avoid overtime payments. The court determined that the city's purpose, by itself, did not make the city's actions improper, and indeed the purpose was one of several factors the court considered in evaluating the city's

conduct.[9] Id. at 528. At bottom, there is

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[9]The other two factors were whether the extension of the tour of duty was compensated and whether the firefighters agreed to the schedule change. The court found that the city had failed to compensate for the additional time, a consideration weighing in favor of finding the change not to be bona fide. Nonetheless, the court did not pass on the validity of the schedule change, because there existed genuine issues of material fact on the question of the firefighters' agreement to the schedule change, as required under 29 C.F.R. § 553.222(c). 682 F. Supp. at 531. See also Johnson v. City of Columbia, 949 F.2d 127, 129-30 (4th Cir. 1991) (under similar facts, focusing on issue of agreement of firefighter to exclude sleep time, pursuant to 29 C.F.R. § 553.222(c)).

nothing improper about a state or local-government employer adopting the subsection (k) framework in order to take advantage of that subsection's provisions. According to Plaintiffs, the City's actions went beyond the benign and were solely directed towards denying Plaintiffs overtime compensation for meal periods, if such periods were ever adjudged compensable. This argument, however, misses the mark.[10] Even if

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[10]The City's intention, even if it could be correctly characterized as self-promoting statutory maneuvering, certainly is not as flagrant as the city's motive in Rome, a pure manipulation to reduce that city's payment burden. Yet, despite the City of Rome's motive, the court found that the motive did not by itself make the city's employment scheme improper. Furthermore, in contrast to the facts in Rome, the City of Shawnee did not, as the City of Rome did, extend the tour of duty without compensation; the tour of duty was not extended at all. In contrast, the City of Shawnee continued to pay overtime commencing at a lower threshold than required under subsection (k). Finally, the City of Shawnee was not required to obtain the consent of its police force before instituting a § 207(k) program.

Defendant's sole purpose were to avoid the prospect of paying overtime rates for meal periods, Plaintiffs do not demonstrate in what way that aim would be improper. Section 207(k) gives employers of fire protection and law enforcement personnel greater leeway in structuring wage and time calculations. See Wethington, 935 F.2d at 224 (citing § 207(k)). The trial court correctly denied Plaintiffs' motion for directed verdict and renewed motion for summary judgment, as there was evidence upon which the jury could properly have found that the City had established a 28-day work period permissible under subsection (k).

2. The Court properly instructed the jury.

Plaintiffs next submit that two of the trial court's instructions to the jury were in error. On appeal of a trial court's jury

instructions, the appellate court, after review of the record as a whole, must determine whether the instructions correctly state the applicable law and provide the jury with ample understanding of the issues and standards of the case. United States v. Zimmerman, 943 F.2d 1204, 1213 (10th Cir. 1991). "We must consider not whether the charge was faultless but whether the jury had an understanding of the issues and its duty to determine these issues." Id. In that regard, only prejudicial error in the jury instructions will mandate reversal. Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1271 (10th Cir. 1988).

The first instruction in question held Defendant to only a preponderance of the evidence standard in demonstrating its establishment of a bona fide subsection (k) program. The court's Instruction no. 4 stated in part:

> With regard to its claim that it is exempt from the Act by establishment of a 28-day work period, defendant has the burden of proving that its claim to an exemption is more probably true than not.

(R., Appendix to Brief of Appellants, exh. I). It is Plaintiffs' position that a preponderance of the evidence standard is improper, because an employer claiming an exemption under FLSA must show affirmatively that the exemption applies. Certainly, "[a]n employer who asserts he is exempt from the Act 'has the burden of establishing the exemption affirmatively and clearly.'" Schoenhals v. Cockrum, 647 F.2d 1080, 1081 (10th Cir. 1981) (citing Legg v. Rock Products Manufacturing Cop., 309 F.2d 172, 174 (10th Cir. 1962)). But the City is not

seeking an exemption as such.[11] Rather

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[11]Entitled "Exemptions," § 213 of FLSA describes in detail the numerous employment circumstances to which the FLSA requirements, most notably those contained in § 207, do not apply. For example, in Schoenhals, the employer sought exemption from FLSA's minimum wage and overtime mandates as a retail or service establishment having gross receipts of less than $250,000 a year, under § 213(a)(2) (repealed). 647 F.2d at 1081. Moreover, while even other subsections of § 207 may best be characterized as providing an exemption from subsection (a), see e.g., Donovan v. Brown Equipment & Service Tools, Inc., 666 F.2d 148, 153 (5th Cir. 1982) (regarding establishment of Belo plan, pursuant to § 207(f)), the instant subsection (k) plan is more properly denoted an optional regime, whose determination lies solely with the City's exercise of choice. The establishment of the instant plan was not dependent on the affirmative satisfaction of extrinsic conditions, as would be, for example, a subsection (f) plan or, indeed, some other subsection (k) plans, see e.g., Johnson v. City of Columbia, 949 F.2d 127, 129-30 (4th Cir. 1991) (requiring express or implied agreement of firefighters to exclude sleep time under § 207(k) plan, pursuant to 29 C.F.R. § 553.222 (c)).

than taking the position that § 207 does not apply to it, the City contends only that § 207(a) does not apply, and that instead of § 207(k) governs the City's maximum hour and overtime payment policies. As discussed previously, the City was entitled to choose the subsection (k) option. See Wethington, 935 F.2d at 224; Lee v. Coahoma County, 937 F.2d 220, 224 (5th Cir. 1991). The district court was correct in instructing the jury to apply a preponderance of the evidence standard in determining whether the City in fact selected the subsection (k) option.

Second, Plaintiffs assert that the trial court's instructions were in error in failing to require proof of the implementation of a 171-hour overtime threshold as a prerequisite to finding the City has established a subsection (k) work period. Instruction no. 12 states:

> You are instructed that in determining whether the City of Shawnee, Kansas, has established a work period under 207(k) of the Fair Labor Standards Act, you may consider evidence of whether the City of Shawnee, Kansas, actually adopted a 28-day work period. To be adopted, the work period must have been put into effective operation by the City of Shawnee, Kansas.

(R., Appendix to Brief of Appellants, exh. I). Plaintiffs' objection to this instruction is simply a spin-off of the position advanced above: that the City did not establish a bona fide work period under § 207(k) because the compensation and scheduling practices under the new regime did not change after March 30, 1986. We have rejected that view. There is no basis for concluding that, once an employer has opted for the subjection (k) framework, the employer may only pay overtime for hours worked beyond the legal maximum permitted at

the regular wage. See 29 C.F.R. § 553.224(a). The City chose to continue paying overtime starting at a lower threshold, a state of affairs which inured to Plaintiffs' benefit and which was the City's prerogative to devise. Plaintiffs were not prejudiced by the Court's instructions to the jury.

3. The jury's verdict was based on substantial evidence.

Finally, following the same line of reasoning, Plaintiffs assail the jury's verdict that the City did establish a 28-day work period. When a party challenges a jury verdict, the reviewing court will examine the record in the light most favorable to the prevailing party. White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983). The court will not set aside the jury verdict unless the challenging party

demonstrates that the verdict followed prejudicial error committed during the course of the trial or that the verdict was not based on substantial evidence. Id. Consistent with our prior analysis, we conclude that the jury verdict was supported by substantial evidence. The evidence that Defendant adopted Administrative Code No. 2-5 was uncontested. By adopting the measure, the City took the necessary and sufficient steps to establish a subsection (k) regime.

Finally, Plaintiffs raise an evidentiary issue bearing on whether the verdict followed prejudicial error committed during the course of the trial court proceedings. After retiring to deliberate, the jury sent a note requesting the transcribed testimony of witnesses Chief Chester A. Hall and Captain Thomas J. Hayselden, Jr., both of whom had testified

within the previous seven days. Because the transcripts were not then available, Plaintiffs' counsel requested a read-back of the testimony. The court denied the request, directing the jury to rely on its best recollection of the testimony. (R., Appendix to Brief of Appellants, exh. T at 24-36). Plaintiffs believe the testimony was crucial in showing the § 207(k) system was never activated, as both witnesses testified that the City never implemented a 171-hour overtime threshold. Even if this testimony were particularly pertinent, which it is not, the denial of the requested read-back was well within the trial judge's sound discretion. The testimony was not so complicated or remote in time that a read-back would have served any compelling purpose.

B. Rate of Compensation

The second question for our consideration addresses the proper rate of compensation for Plaintiffs' time spent during meal periods, upon a jury determination that those periods are compensable.[12] While Plaintiffs contend

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[12]This question is raised by Defendant's stated appeal issue no. 3.

that they should receive an overtime wage for mealtime hours, the Defendant argues that the statutory minimum wage should be the proper rate. The district court awarded Plaintiffs damages calculated at a regularly hourly rate. The court reasoned that the jury's finding of a 28-day work period partially released the City from paying overtime compensation. Specifically, Plaintiffs were entitled to be paid no more than their regular wage for hours worked over 160 and up through 171 hours and to be paid overtime wages for hours worked above 171 hours. Because the Plaintiffs took no more than ten hours for meal periods within a 28-day cycle, the judge determined that the compensation due would be calculated at the regular hourly rate.

The issue of the proper calculation of mealtime compensation presents "a mixed

question of law and fact which would require us to accept the district court's factual conclusions unless clearly erroneous but review the application of the facts to the law under a de novo standard." Federal Deposit Ins. Corp. v. Oaklawn Apartments, 959 F.2d 170, 173 (10th Cir. 1992). The appellate record suggests no basis for doubting the district court's finding that each Plaintiff took no more than ten hours in meal periods within a 28-day period. This fact, along with the unassailed testimony that Plaintiffs received overtime compensation for all other time worked in addition to their regular 40 hours per week or 160 hours per 28 days, forms the factual basis for the district judge's legal conclusion that mealtime hours, all of which fell within the range of 160 to 171 hours per 28 days, would be appropriately

compensated at a regular hourly rate. See 754 F. Supp. at 1521 n.1. We affirm this decision for the reasons expressed in the district judge's opinion. As long as time spent for meal periods, together with the rest of an officer's compensable time at a regular wage, would not exceed 171 hours per 28 days, no overtime wages would be due for that total time, a result consistent with FLSA. Simply because Defendant chose, after adopting the § 207(k) plan, to continue paying an overtime wage for all hours worked over 160 hours per cycle, while not paying compensation for meal periods, does not compel the conclusion that, were mealtime to be adjudged compensable, the Defendant should be penalized for its own liberality. However, as the district court held, even if the City is not required to pay overtime, compensation for meal periods at a rate less

than a regular wage would be contrary to FLSA.

C. Compensability of meal periods

The second issue for our consideration is the compensability of meal periods. By cross appeal, the City maintains first that the trial court erred in denying Defendant's motion for directed verdict on the mealtime claim. The City moved for directed verdict at the conclusion of Plaintiffs' case and at the conclusion of all the evidence. The trial court denied both motions. Second, Defendant challenges the trial court's instructions to the jury with respect to the appropriate standard for determining the compensability of meal periods.[13]

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[13]These issues are before this court in the form of Defendant's stated appeal issues nos. 1 & 2.

1. The Court did not err in submitting to the jury the issue of compensability of meal periods.

As discussed in detail below, in the § 207(k) context a law enforcement employee is considered to be completely relieved from duty during a meal period when the employee's time is not spent predominantly for the benefit of the employer. FLSA requires remuneration for meal periods during which a police officer is unable comfortably and adequately to pass the mealtime because the officer's time or attention is devoted primarily to official responsibilities. During meal periods, Shawnee police officers are required either to leave a telephone number where they can be reached or to monitor a portable radio. In addition to responding to emergency calls, officers must answer to personnel

shortages if instructed to do so. Furthermore, an officer on meal break is obligated to respond to citizen requests or inquiries, to confront crimes committed in the officer's presence and to act in a responsible and professional manner. In selecting a meal location, the City restricts its police officers to the City limits or, with approval, to locations in close proximity to the City. Finally, the officers may not conduct personal business errands during the 1/2-hour period. Viewing this evidence most favorably and giving the benefit of all reasonable inferences from the evidence to Plaintiffs, we do not find that the evidence points but one way and is susceptible to no reasonable inference supporting the Plaintiffs' claim. Based on the number and range of restrictions placed on Plaintiffs, there was sufficient evidence

upon which the jury could properly have returned a verdict for the Plaintiffs on this issue.

2. The Court erred in instructing the jury as to the appropriate standard for determining the compensability of meal periods.

The trial court's instructions on the law charged the jury with applying a "completely relieved from duty" standard in deciding the Plaintiffs' entitlement to compensation for meal periods. Instruction no. 10 directed:

> Unless plaintiffs' meal periods are 'bona fide' meal periods under the Fair Labor Standards Act, plaintiffs' meal periods are compensable work time. Bona fide meal periods are not work time. To qualify as a bona fide meal period, the employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

(R., Appendix to Brief of Appellants, exh. I). This language closely tracks the Code of Federal Regulations treatment of "meal periods," under 29 C.F.R. § 785.19.[14]

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[14]Part 785 of Title 29 of the Code of Federal Regulations consists of the Department of Labor, Wage and Hour Division's regulations generally applicable under FLSA to determinations of "hours worked." Section 785.19(a) addresses when meal periods are properly counted as work time:

> Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

29 C.F.R. § 785.19(a) (citations omitted).

Nonetheless, as the introductory statement to Part 785 makes evident, the regulations contained therein are addressed to the standard workweek and are not specifically tailored to the employment practices permitted under § 207(k). See 29 C.F.R. § 785.1. In guiding the functioning of the Act as a whole, Part 785 delineates "the principles involved in determining what constitutes working time" under the minimum wage requirements of § 206 and the weekly overtime provisions of § 207, generally. Id. Although Part 785 is generally applicable, Part 553, which pertains to employees of state and local governments and specifically addresses the § 207(k) tour of duty regime, applies more precisely to the facts of this case. See 29 C.F.R. §§ 553.220-227.

Section 553.223(b) governs the compensability of meal periods, in the subsection (k) context, for law enforcement personnel working shifts of fewer than 24 hours.[15] Like § 785.19, this section

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[15]Section 553.223(b) provides that a subsection (k) employer

> . . . may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests in § 785.19 of this title are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

29 C.F.R. § 553.223(b). A "tour of duty" is "the period of time during which an employee is considered to be on duty for purposes of determining compensable hours." Id. at § 553.220(a).

requires compensation for meal periods during which an employee is not "completely relieved from duty." Also, 553.223(b), by reference to § 785.19, mandates that uncompensated meal periods "must be scheduled, occur at a regular time, and normally be thirty minutes or more." Lee v. Coahoma County, 937 F.2d 220, 225 (5th Cir. 1991) (citing § 785.19 in discussing § 553.223). Not appearing in § 553.223(b), however, is § 785.19's statement: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating." Furthermore, § 553.223(b) goes on to illustrate circumstances involving law enforcement personnel that would run afoul, if not compensated, of the "completely relieved from duty" standard, citing the examples of personnel required to remain on call in

barracks or similar quarters or assigned to extended surveillance duties, such as stakeouts. We find these differences instructive in determining the reach of the completely relieved from duty standard pursuant to § 553.223(b). Hence, a police officer must primarily be engaged in work-related duties during meal periods to warrant compensation therefor. That a police officer is on-call and has some limited responsibilities during meal periods does not perforce mean the office is working. See Lee, 837 F.2d at 225; Leahy v. City of Chicago, 785 F. Supp. 724, 728-30 (N.D. Ill. 1992). Instead, consistent with

the language of § 553.223(b) and with traditional principles underlying FLSA,[16] a

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[16]See Tennessee C., I. & R. Co. v. Muscoda, 321 U.S. 590, 589, 64 S. Ct. 698, 88 L. Ed. 949 (1944) (regarding time required by miners for subterranean travel, work means "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business"); Armour & Co. v. Wantock, 323 U.S. 126, 133-34, 65 S. Ct. 165, 89 L. Ed. 118 (1944) (applying predominant benefit test to time spent on employer's premises by fireguards); Skidmore v. Swift & Co., 323 U.S. 134, 138-39, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944) (resolution of compensation issue turned on extent to which fireguards on employer's premises could engage in personal activities while on call); Mitchell v. Greinetz, 235 F.2d 621, 623 (10th Cir. 1956) (applying predominant benefit test to weavers' 15-minute rest period); Handler v. Thrasher, 191 F.2d 120, 122 (10th Cir. 1951) (applying predominant benefit test to on-call oil field pumper); F.W. Stock & Sons, Inc. v. Thompson, 194 F.2d 493, 496-97 (6th Cir. 1952) (time spent during lunch period predominantly for employer's benefit found to be compensable working time).

law enforcement employee is completely relieved from duty during a meal period, for purposes of § 553.223(b), when the employee's time is not spent predominantly for the benefit of the employer. Cf. Renfro v. City of Emporia, 948 F.2d 1529, 1538 (10th Cir. 1991), cert. dismissed 112 S. Ct. 1310, 117 L.Ed.2d 510 (1992) (restrictions placed on on-call firefighters' personal pursuits created benefit to employer making time compensable under § 207(k)); Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185 (10th Cir. 1989) (applying predominant benefit test to on-call power company employees, under § 207(a)); Norton v. Worthen Van Service, Inc., 839 F.2d 653, 654-55 (10th Cir. 1988) (considering extent to which on-call van drivers were able to

pursue personal activity, in appeal of back wages claim under FLSA).[17] If during meal periods a police officer's time and attention are primarily occupied by a private pursuit, presumably the procurement and consumption of food, then the officer is completely relieved from duty and is not entitled to compensation under FLSA. Conversely, a police officer is entitled to compensation for meal periods if the officer's time or attention is taken up principally by official responsibilities

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[17]This circuit has made clear that under FLSA the "test to determine whether on-call time is compensable 'requires consideration of the agreement between the parties, the nature and extent of the restrictions, the relationship between the services rendered and the on-call time and all surrounding circumstances.'" Renfro v. City of Emporia, 948 F.2d 1529, 1537 (10th Cir. 1991) (quoting Boehm v. Kansas City Power & Light Co., 868 F.2d 1182, 1185 (10th Cir. 1989)).

that prevent the officer from comfortably and adequately passing the mealtime.[18]

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[18]In coming to this conclusion, we note that our interpretation of the "completely relieved from duty" standard only applies to that phrase as used in §553.223(b). For that reason, with respect to the application of the "completely relieved from duty" standard in Wahl v. City of Wichita, 725 F. Supp. 1133 (D. Kan. 1989) and Nixon v. City of Junction City, 707 F. Supp. 473 (D. Kan. 1988), both of which relied on § 785.19 in ruling that meal periods of police officers were compensable, we make no comment, except for noting the following. While both decisions adhered to a "completely relieved from duty" standard, the court in Wahl, after citing the predominant benefit test, stated: "What matters in meal period cases is whether the employee is subject to real limitations on his personal freedom which inure to the benefit of his employer." 725 F. Supp. at 1144. In Nixon the court found that the plaintiff police officers in that case performed "substantial duties" during their lunch periods. 707 F. Supp. at 478. Moreover, our contrasting of the two sections, § 553.223(b) and § 785.19, does not mean that the "completely relieved from duty" standard as used in the latter section should necessarily take on a different meaning than that of the former section. See, e.g., Hill v. United States, 751 F.2d 810, 813-14 (6th Cir. 1984) (applying predominant benefit test to meal periods of letter carrier under § 785.19).

As literally extracted from § 785.19, the trial court's instruction no. 10 deprived the jury of an ample understanding of the issues and standards of the case. The instruction countenanced the misapprehension that the performance of any official duty, no matter how insignificant, during meal periods rendered the time compensable. We reject that result. We reverse and remand for a new trial on this issue.

### D. Preparation for pre-shift briefings

The supervisory Plaintiffs contest the jury's determination that they are not entitled to recover for time spent prior to shift briefings.[19] These Plaintiffs, all

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[19]This question is raised by Plaintiffs' stated appeal issue no. 6.

of whom served either as sergeants or acting sergeants, seek compensation for the 15-30 minutes they allege they spent, prior to pre-shift briefings, preparing for those briefings. The 15-minute briefing, at the beginning of each 8 1/2-hour shift, is one of the responsibilities of a supervising sergeant. According to the testimony of the supervisory Plaintiffs, the briefings necessitate advance preparation in the form of reviewing daily intra-office communications and directives; sorting through paperwork on pending investigative and monitoring tasks, such as citizen letters regarding abandoned vehicles and citizen vacation watch notifications; inventorying administrative and court documents requiring attention, such s uncompleted reports and court subpoenas and notices; reviewing the duty roster;

gathering information regarding what crimes have occurred during the previous shift; determining what cars are available; and, making car, patrol and meal period assignments. (R., Appendix to Brief of Appellants, exh. T at 320-23; Appellee's Supplemental Appendix, exh. G at 535, 564 & 635). This testimony by the supervising Plaintiffs was confirmed by one of Defendant's witnesses, who also has served as a supervising sergeant on the Shawnee police force. (R., Appellee's Supplemental Appendix, exh. G at 829).

Notwithstanding the quantity and uniformity of this testimony, the jury could have chosen not to believe that the supervisory Plaintiffs were, as a matter of fact, working prior to pre-shift briefings. Mere presence at the workplace does not require compensation if the employee freely

chooses to put in additional time as a matter of personal preference or convenience. See Lindow v. United States, 738 F.2d 1057, 1061 (9th Cir. 1984). Section 553.221(b) of the Federal Code of Regulations, Title 29, states:

> Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such time includes all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related to the performance of the principal activity, such as attending role call, writing up and completing tickets or reports, and washing and reracking fire hoses.

29 C.F.R. § 553.221(b). In carrying out its function of assessing witness credibility, the jury may have simply found that the supervisory Plaintiffs' pre-shift activities

were not properly characterized as work. See Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir. 1975). See also Handler v. Thrasher, 191 F.2d 120, 123 (10th Cir. 1951) (compensation commensurate with number of hours employee worked for the employer's benefit); Wirtz v. Bledsoe, 365 F.2d 277, 278 (10th Cir. 1966) (same). The jury could have properly concluded that the supervisory Plaintiffs failed to meet their burden of proof on this claim. The appellate court will not retry the issues or second guess the decision-making of the jury. It is the jury's exclusive province to assess the credibility of witnesses and determine the weight to be given to their testimony. White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983). The supervisory

Plaintiffs have failed to demonstrate a basis for overturning the jury verdict.[20]

### E. Liquidated damages and attorneys' fees

Finally, Defendant challenges the trial court's award of liquidated damages and attorneys' fees.[21] In light of the

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[20]As an aside, we note that the jury may have been misled by an incorrect instruction applying to the supervisory Plaintiffs' claim. Instruction no. 9, after delineating the elements necessary for the supervisory Plaintiffs to prove their preparation time claims, contains the curious statement: "if the defendant has satisfied you by a preponderance of the evidence that it is exempt from the overtime pay law, then your verdict should be for the defendant." (R., Appendix to Brief of Appellants, exh. I). This statement is incorrect. The establishment of a § 207(k) regime does not mean the City does not have to compensate an employee for additional time worked. Plaintiffs, however, did not raise the propriety of the instruction as an issue on appeal. Rather, Plaintiffs chose to raise the issue as a failure of proof, as a lack of substantial evidence in support of the verdict, when it was the Plaintiffs who bore the burden of proof.

[21]These questions are raised by Defendant's appeal issues nos. 4 & 5.

foregoing discussion, both of these awards should be revisited by the district court. In assessing Plaintiffs' claim for liquidated damages, the court should be guided by the "good faith" and "reasonable grounds" test as described in Renfro v. City of Emporia, 948 F.2d 1529, 1540 (10th Cir. 1991), cert. dismissed 112 S. Ct. 1310, 117 L.Ed.2d 510 (1992). Of course, in evaluating any claim for attorneys' fees the court should follow the procedures required by Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983).

## III. CONCLUSION

We conclude: That the district court did not err in submitting to the jury and instructing the jury on the issue of the establishment of a 28-day work period; that the jury verdict finding that the City did establish a 28-day work period was supported

by substantial evidence; that the trial court did not abuse its discretion in denying a read-back of the testimony of two witnesses; that the trial court correctly calculated the rate at which Plaintiffs would be compensated for mealtimes, if adjudged compensable; the trial court did not err in submitting to the jury the issue of the compensability of meal periods; that the trial court did err in instructing the jury on the applicable standard for determining the compensability of meal periods; that the jury verdict finding that the supervisory Plaintiffs should not be compensated for time spent in preparation for pre-shift briefings should be affirmed; and, that following further proceedings in this case, the district court should reconsider Plaintiffs' claims for liquidated damages and attorneys' fees. Accordingly,

we AFFIRM in part, REVERSE in part, VACATE the district court's award of liquidated damages and attorneys' fees, and REMAND for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| BILLY W. LAMON; PAUL E. PAGACZ; RONALD W. WARD; DONALD FOLTZ; MICHAEL G. McCOY; LARRY EVANS; JOHN ENGLAND; MARK W. HEIN; JOHN C. BINCKLEY; DON B. GAMBLIN, JR.; FRANKLIN K. SULLIVAN; MARK A. ASHURST; PAUL F. ARNOLD; TERRY P. LAWSON; RANDY A. PEDDICORD; TIMOTHY E. WIND; THOMAS F. CARNEY; | ) | CIVIL ACTION |
| Plaintiffs, | ) | |
| vs. | ) | No. 88-4200-S |
| CITY OF SHAWNEE, KANSAS, | ) | |
| Defendant. | ) | |

MEMORANDUM AND ORDER

This matter is before the court on motion of defendant City of Shawnee ("defendant") for summary judgment or in the alternative for partial summary judgment.

Plaintiffs Billy W. Lamon, et al. ("plaintiffs") have moved for leave to file a cross motion for summary judgment out of time. Because the court finds that oral argument will not materially aid in the disposition of defendant's motion for summary judgment, the court will deny defendant's request for oral argument. D. Kan. 206(d).

Plaintiffs' action is brought under the Fair Labor Standards Act of 1938 ("FLSA"), §1 et seq., as amended, 29 U.S.C. §201 et seq., and the Kansas Minimum Wage and Maximum Hour Law ("KMWMHL"), K.S.A. 44-1201 et seq. Plaintiffs also claim damages arising out of breach of an implied contract. Plaintiffs further seek to recover liquidated damages, attorney fees, and equitable relief as authorized by 29

U.S.C. §216(b). Pursuant to this court's Memorandum and Order filed July 10, 1990, the issues of liability and damages have been bifurcated.

This action involves an employment dispute between the plaintiffs who are police officers and their employer, the City of Shawnee. Plaintiffs contend that defendant has willfully violated the overtime pay provisions of the FLSA and the KMWMHL by failing to compensate the plaintiffs for meal periods. Further, plaintiffs allege noncompensation for meal periods constitutes a breach of an implied contract of employment.

A moving party is entitled to summary judgment only when the evidence indicates that no genuine issue of material fact exists. Fed. R. Civ. P. 56(c); Maughan v.

SW Servicing, Inc., 758 F.2d 1381, 1387 (10th Cir. 1985). The requirement of a "genuine" issue of fact means tat the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party has the burden of showing the absence of a genuine issue of material fact. This burden "may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may no rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial."

Anderson, 477 U.S. at 256. Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. The court must consider factual inferences tending to show triable issues in the light most favorable to the existence of those issues. United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986). The court must also consider the record in the light most favorable to the party opposing the motion. Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984), cert. denied, 469 U.S. 1214 (1985).

For purposes of addressing defendant's motion for summary judgment, the uncontroverted facts may be summarized as follows. Plaintiffs are 15 (13 currently and two formerly employed) patrol officers

and shift sergeants serving in the Uniformed Patrol Division of the Shawnee Police Department. The Patrol Division of the Shawnee Police Department operates 24 hours each day in three shifts. Each patrol officer's shift consists of an 8½ hour time span which includes a 15 minutes mandatory briefing period before commencement of patrol duty and a 15 minute period at the end of the shift for submitting reports and turning in equipment. The 8½ hour time span also includes a ½ hour meal period referred to by the parties as "E Call." The number of hours in the normal work day or shift has not changed since any of the plaintiffs joined the police department of defendant. Since 1977, plaintiffs have been compensated for eight hours for a work day consisting of 8½ hours. Thus, plaintiffs have not been

compensated for the meal period of ½ hour. However, if a meal period is missed or interrupted, the officer is compensated at a rate of 1½ times the normal hourly rate.

Each shift of the patrol division is under the supervision of a shift sergeant or acting shift sergeant who assigns patrol officers to a specific patrol district each day. The shift sergeant also assigns vehicles and lunch periods to patrol officers. Other responsibilities of the shift sergeant include: supervising patrol officers by monitoring their radio and patrolling in their cars; reading and approving reports responding to emergency situations; and conducting pre- and post-shift briefings. Patrol officers have a duty to patrol the corporate city limits in marked cars and to investigate accidents,

issue citations, respond to reports crimes and to provide a first response to request for assistance. While on patrol, a patrol officer is to maintain communication with the police department's dispatcher.

Patrol officers are paid once every 14 days having worked 10 shifts of 8 ½ hours which includes briefings and meal breaks. The patrol division rotates shifts every 56 days. Defendant has a procedure through which a patrol officer may request overtime compensation at a rate of 1½ times the officer's regular hourly rate. The City of Shawnee has a grievance procedure set forth in §13 of its Personnel Manual to provide employees with an opportunity to present grievances regarding their employment. None of the plaintiffs in this action have filed a grievance with defendant.

On January 22, 1986, the defendant's Administrative Code was revised by Deputy Chief Hall and signed by defendant's City Manager. The stated purpose of this revision was "to set forth policy for hours of employment scheduling of police personnel, relief periods, compensation and trading of working hours." (Defendant's Brief, Exhibit A). The revision to the Administrative Code provided that a daily tour of duty for the Patrol Division included an 8½ hour time span beginning with a ½ hour period for completion of reports. This revision also provided that any time spent beyond the ½ hour after patrol duty is compensable at a rate of 1½ times the regular hourly rate. Further, the revision to the Administrative Code specifically addressed the meal period by stating that

"[t]he lunch period shall be uninterrupted except in the case of emergencies beyond the control of the Police Department." (Defendant's brief, Exhibit A.).

Shift sergeants assign lunch periods to patrol officers at the morning briefing on the basis of seniority. Meal periods may be scheduled at any time during the day with the exception that no meal period may be scheduled during the last hour of the shift. Further, meal periods are staggered throughout the shift so that manpower remains constant. In order to begin a meal period, an officer must notify the dispatcher. At the end of the meal period, the officer must once again contact the dispatcher to inform him that his meal period is over. Officers must take their lunch period within the city unless they

specifically request permission to travel beyond city limits. In addition, officers are also permitted to use drive-through lanes and to purchase carry-out food before beginning their lunch period. Officers may eat at home if it is located within the city limits.

Officers are allowed to take their lunch period at the police department headquarters which is equipped with vending machines, a refrigerator, microwave oven, table, chairs and a couch. They may take their lunch period at any location in the police station including the locker room or weight room. During the evening shift officers are frequently interrupted during meal breaks taken at the police station. Further, officers may receive calls from the dispatcher which require them to leave their

meal break early. Some officers work on reports or make work-related phone calls during their meal period. When in public view, plaintiffs must abide by rules and regulations of defendant, or they risk disciplinary action. Each officer is given a copy of the governing rules and regulations at the time of hiring.

Fair Labor Standards Act

In its motion for summary judgment, defendant first argues that it has not violated the FLSA, because even if meal periods are worktime, plaintiffs are not entitled to overtime for meal periods pursuant to 29 U.S.C. §207(a). Defendant premises this contention on the fact that defendant allegedly has adopted a 28-day work period for plaintiffs. Thus, defendant argues, it is exempt under 29 U.S.C. §207(k)

from paying for overtime if plaintiffs work less than 171 hours in a 28-day work period. Title 29, United States Code, Section 207(k) provides in relevant part:

> [n]o public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in . . . law enforcement activities . . . if --
>
> > (1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days . . . .

Pursuant to 29 C.F.R. §553.201, the

Secretary of Labor has established that 171 hours is the maximum number of hours a law enforcement officer may work in a work period of 28 days before the officer is paid overtime. Defendant contends that it adopted a 28-day work period when it amended its Administrative Code on January 22, 1986.[1]

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[1] This portion of the Administrative Code provides in relevant part:

> [p]ursuant to Section 207(k) of the Fair Labor Standards Act, Title 29, Code of Federal Regulations, the City of Shawnee Police Department has declared a 28-day work period for all sworn personnel assigned to the patrol and investigative divisions. This declaration shall become effective on March 30, 1986.
>
> B. Sworn Personnel - 207(k) Option of FLSA, Title 29,
>
> (1) <u>28 day work schedule</u>
>
> All sworn personnel assigned to patrol or investigation shall be scheduled duty assignments within 28 day cycles. Hours worked in excess of 171 hours within the 28 day cycle shall be compensated at the rate of time and one-half (1½).

In further support, defendant has submitted an affidavit of Rita M. Jones, a former secretary of the defendant. In this affidavit, Ms. Jones states that the "monthly schedule" is a schedule for two 28-day work periods. Based upon the foregoing evidence, defendant asserts that it had effectively implemented a 28-day work period prior to the date §207(a)'s overtime provision became applicable to the defendant. Therefore, defendant argues, plaintiffs' employment is governed by the exception of §207(k), and accordingly, defendant does not owe plaintiff overtime for meal periods regardless whether these periods are compensable time. Plaintiff responds that defendant did not actually adopt a 28-day work period. Instead, plaintiff argues that deposition testimony

indicates that the work period was not adopted and that subsequent to the amendment of defendant's administrative code, defendant continued to employ a 40 hour work week period.

In analyzing whether defendant falls within an exemption to the maximum hour provisions of §207(a), the court notes that "[e]xemptions from FLSA are to be narrowly construed against the employer . . . [t]he burden of proof is on the employer to establish an exemption." Guthrie v. Lady Jane Colliers, Inc., 722 F.2d 1141, 1143 (3d Cir. 1983). Further, the defendant must prove applicability of an exemption by "clear and affirmative evidence." Donovan v. United Video, Inc., 725 F.2d 577, 581 (10th Cir. 1984) (citing Walling v. General Industries Co., 330 U.S. 545, 547-73 (1947).

As stated in Nixon v. City of Junction City, 707 F. Supp. 473, 479 (D. Kan. 1988), "[a]n established work period is a keystone to the section 207(k) exclusion." A work period is defined in 29 C.F.R. §553.224 which provides in relevant part:

> . . . 'work period' refers to any established and regularly recurring period of work which under the terms of the Act and legislative history cannot be less than 7 consecutive days nor more than 28 consecutive days. Except for this limitation the work period can be of any length and it need not coincide with the duty cycle or pay period or with a particular day of the week or hour of the day . . . .

Thus, respondent asserts that it has adopted a 28-day work period by amending its Administrative Code. In Nixon, the court considered a similar situation in which the plaintiff argued that defendant had adopted a 14-day work period by a city declaration.

The court held that a credibility issue existed as to whether the declaration was meant to be an adoption of a 14-day work week or a reaffirmation of an existing 14-day work week. Nixon, 707 F.Supp. at 479.

After careful consideration, the court finds that it cannot determine whether defendant actually implemented a 28-day work period. Deposition testimony of Captain Bill Amer and Captain Thomas K. Hayselden, Commander of Staff Services, and Police Chief Hall demonstrate that there is a genuine issue of material fact, i.e., whether the 28-day work period was ever adopted or whether the Administrative Code was merely amended. Thus, whether defendant

has adopted a 28-day work period remains an issue to be determined at trial.[2] Consequently, whether defendant is exempted from payment of overtime under the express terms of §207(a) remains at issue.[3]

---

[2] The court is cognizant of defendant's argument that the 28-day work period was adopted, and that defendant merely chose to be more generous than was required by §207(k). Defendant argues that it continued to keep in effect its practice of paying overtime compensation for hours worked in excess of 160 instead of 171 hours as required by §207(k). However, despite the persuasiveness of defendant's argument that the City of Shawnee is being more generous than is required by §207(k), the court finds whether the amendment to defendant's Administrative Code constituted an adoption of a 28-day work period remains a factual issue to be decided by the jury.

[3] Defendant also asserts that if it is found to owe compensation for overtime worked pursuant to §207(a), it is entitled to credit for any overtime compensation which it has already paid to plaintiffs. The court will not address this issue presently, as the sole issue now before the court is whether the overtime provisions of the FLSA were violated.

Next, as an alternative to defendant's argument that it is exempted from the maximum overtime provision of §207(a), defendant argues that it is not liable for overtime compensation under the FLSA because plaintiffs' meal periods are not worktime. In determining whether plaintiffs' meal periods are compensable time, the court finds guidance in regulations promulgated by the Department of Labor. The regulations provide in relevant part:

> **§785.19 Meal.**
>
> (a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee

> is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (Emphasis added).

Although not binding on this court, the interpretation of an administrative agency charged with issuing regulations pursuant to a federal law has been held to be "entitled to great weight and the court may properly resort to them for guidance." Wirtz v. Healy, 227 F.Supp. 123, 130 (N.D. Ill. 1964). See also Swift v. Skidmore, 323 U.S. 134, 140 (1944).

Thus, finding §785.19 to provide helpful guidance, courts have adopted a "completely relieved of duty" test for determining whether meal periods are work time. See Wahl v. City of Wichita, 725

F.Supp. 1133, 1139 (D. Kan. 1989) (citations omitted). Twice courts in this District have addressed whether meal periods of police officers were bona fide meal breaks. In Wahl, 725 F.Supp. 1133, 1139 (D. Kan. 1899) and Nixon, 707 F.Supp. 473, 478-79 (D. Kan. 1988), both Judge O'Connor and Judge Kelly applied the "completely relieved of duty" standard.[4] Likewise, this court finds the appropriate standard to be whether the plaintiffs were "completely relieved of duty".

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[4] Defendant argues that the "completely relieved of duty" test adopted by the courts in Nixon and Wahl, should be whether the employee is required to perform any activities that could be characterized as substantial duties." (Defendant's brief at 32). The court finds the cases which defendant cites for this proposition to be unpersuasive in that they are distinguishable from this case as discussed in Nixon v. City of Junction City, 707 F.Supp. at 479.

Plaintiffs allege that their meal periods are not bona fide meal breaks because they are required to perform duties for their employer. Plaintiffs further assert that they remain on call and frequently must respond to emergencies. Moreover, plaintiffs argue that the restrictions placed on their lunch periods are so limiting that for practical purposes, they remain on duty. Such restrictions include: responding to emergencies; maintaining a professional appearance; monitoring their radios; being courteous to members of the public; not sleeping in the patrol car or anywhere else in public; and not conducting personal business while in uniform or in a patrol car.

Defendant responds by first asserting that the plaintiffs are not required to take

their lunch breaks away from police headquarters. Thus, defendant argues, plaintiffs have voluntarily submitted themselves to restrictions which the defendant necessarily places upon officers when in the view of the public. In response, plaintiffs argue that when they take meal breaks at police headquarters, they usually work on reports or take business calls and answer other questions related to work.

After careful consideration of the relevant facts and arguments of the parties, the court finds that a genuine issue of material fact exists concerning whether plaintiffs' meal breaks are bona fide meal periods. Plaintiffs have submitted deposition testimony from various patrol officers which indicates that the

interruptions during meal breaks occur so often that they are unable to take regular meal periods. Frequently, scheduled meal periods get changed so that an officer may not even be able to take a meal break. Further, although defendant has submitted evidence that officers are allowed to conduct personal business over their lunch periods, this evidence is controverted by testimony that officers may be disciplined for conducting business at a bank over lunch while in uniform, or reading nonwork-related materials over their lunch break. Furthermore, the court is unpersuaded by defendant's argument that police officers submit voluntarily to the restrictions placed upon them in public because they choose to eat away from the Police Department.

As stated in Mumbower v. Callicott, 526 F.2d 1183, 1188 (8th Cir. 1975), "[t]he employer who wishes no such work to be done has a duty to see it is not performed. He cannot accept the benefits without including the extra hours in the employee's weekly total for purposes of overtime compensation. . . . Extra work for the employer's benefit and with his tacit approval must be included in determining whether overtime compensation is statutorily required." The Mumbower court's holding specifically addressed the issue of compensability for lunch periods when the employer was cognizant of the fact that the employee continued to work through her lunch period. In this case, plaintiffs have presented deposition testimony that supervisors are aware and approve of officers working through their meal periods.

Additionally, plaintiffs have testified that they are discouraged from submitting overtime requests for overtime for time spent over their meal break. Accordingly, because the court finds that there are genuine issues of material fact, i.e., whether the officers are "completely relieved of their duties" for purposes of taking a regular meal breaks, the court will deny defendant's motion for summary judgment with respect to plaintiffs' claim for compensation for meal periods under the FLSA.

Kansas Minimum Wage and Maximum Hour Law

Defendant next contends that it should be granted summary judgment on plaintiffs' allegations of violations under the KMWMHL. In its motion, defendant first argues that meal periods are non-compensable because

they are not work time. Next, defendant argues that any claims which plaintiffs may have under the KMWMHL prior to August 23, 1985, are barred by the statute of limitations, specifically K.S.A. 60-512, which provides a three year limitation period for actions brought under state statutes. Third, defendant contends that claims which may have arisen subsequent to the enactment of K.S.A. 44-1204(c)(1) are barred because this section provides that the KMWMHL does not apply to employees who are covered by §7 of the FLSA> Finally, defendant argues that no plaintiff can identify a specific section of the KMWMHL which has been violated because the maximum hours which may be worked before employees must be compensated for overtime in a 28-day period is 258 hours. Defendant concludes

that no plaintiff works anywhere near 258 hours in a 28-day period.

The court finds that plaintiffs' alleged claims arising prior to the three year period preceding the filing of this action (August 23, 1985) are barred by K.S.A. 60-512. Further, the court finds that any claims arising after the amendment to the FLSA, April 15, 1986, are precluded by the express provisions of K.S.A. 44-1204(c)(1) which states, "[]he provisions of this section shall not apply to the employment of: (1) Any employee who is covered under the provisions of section 7 of the fair labor standards act . . . ." Thus, the court will address whether defendant is entitled to summary judgment on plaintiffs' alleged claims under the KMWMHL for the

period between August 23, 1985, and April 15, 1986.

Defendant first contends that assuming arguendo that K.S.A. 44-1204(a) is applicable to this case, and further, that meal periods are compensable, no plaintiffs, except shift supervisors, work in excess of 46 hours per week. Accordingly, defendant argues the provision of K.S.A. 44-1204(a) has not been violated. K.S.A. 44-1204(a) provides:

> . . . no employer shall employ any employee for a work week longer than forty-six (46) hours, unless such employee receives compensation for employment in excess of forty-six (46) hours in a work week at the rate of not less than one-half (1 ½) times the hourly wage rate at which such employee is regularly employed.

On the undisputed facts before it, the court finds that, indeed, those plaintiffs who are

not supervisors do not contend that they work in excess of 46 hours per week. Thus, the court will grant defendant's motion for summary judgment in regard to those nonsupervisory plaintiffs' claims for violations of K.S.A. 44-1204(a). However, as to those shift supervisors who allegedly work in excess of 46 hours per week, the court must determine whether meal periods are compensable work periods for purposes of alleged violations of K.S.A. 44-1204(a), and if so, whether the defendant is exempt from the K.S.A. 44-1204(a) because it allegedly has adopted a 28-day work period.

Defendant contends that Atteberry v. Ritchie, 243 Kan. 277, 756 P.2d 424 (1988) controls the issue of whether plaintiffs' meal periods are compensable under K.S.A. 44-1204. In Atteberry, the Kansas Supreme

Court held that meal periods of police officers are noncompensable pursuant to the specific terms of a collective bargaining agreement. Id., 246 P.2d at 427. Defendant argues that because the Kansas Supreme Court determined that meal periods of police officers were noncompensable, meal periods of officers are likewise noncompensable under the KMWMHL. The court finds defendant's argument to be unpersuasive because the Atteberry court's analysis was limited to the contractual provisions of the parties' collective bargaining agreement. Id., 756 P.2d at 427.

Defendant next asserts that assuming plaintiffs' meal periods are compensable work time, defendant has not violated the KMWMHL because defendant is excluded from the overtime provision of K.S.A. by K.S.A.

44-1204(b)(1). This provision provides in relevant part:

> No employer shall be deemed to have violated subsection (a) with respect to the employment of any employee who is . . . engaged in law enforcement activities . . . and who is paid compensation at a rate of not less than one and one-half (1½) times the regular rate at which such employee is employed:
>
> > (1) In any work period of twenty-eight (28) consecutive days in which such employee works for tours of duty which in the aggregate exceed two hundred fifty-eight (258) hours;

K.S.A. 44-1204(b)(1). Because the court has already determined that whether a 28-day work period was adopted is a factual issue, the court will decline to grant defendant's motion for summary judgment with respect to claims brought pursuant to the KMWMHL of

plaintiffs who are sergeants and acting sergeants.

Implied Contract of Employment

Defendant's final contention in support of its motion for summary judgment is that plaintiffs' claim for breach of an implied contract of employment is unsupported by the evidence. "A contract implied-in-fact arises from facts and circumstances showing mutual intent to contract." Mai v. Youtsey, 231 Kan. 419, 646 P.2d 475, 479 (1982). In Allegri v. Providence-St. Margaret Health Center, 9 Kan.App.2d 659, Syl. ¶5, 684 P.2d 1031 (1984) the court stated,

> [w]here it is alleged that an employment contract is one to be based upon the theory of "implied in fact," the understanding an intent of the parties is to be ascertained from several factors which include written or oral negotiations, the conduct of the parties from the commencement of

> the employment relationship, the usages of the business, the situation and objective of the parties giving rise to the relationship, the nature of the employment, and any other circumstances surrounding the employment relationship which would tend to explain or make clear the intention of the parties at the time said employment commenced.

Thus, whether an implied contract existed between the police officers and defendant depends on the parties' intention at the time of hiring. As the court held in Morriss v. Coleman, 214 Kan. 841, 738 P.2d 841, 849 (1987),. "[t]he ultimate decision of whether there was an implied contract . . . must be determined from all the evidence presented by the parties."

Based upon the evidence presented in the parties' pleadings, the court finds that whether an implied contract existed and

whether there was a breach of this alleged contract remains a question to be determined by the trier of fact. Specifically, the court finds that deposition testimony of Officer Amer indicates that when officers were first hired, they were briefed on the practices and policies of defendant in regard to overtime compensation. Consequently, an issue exists concerning whether an implied-in-fact contract arose during the hiring process. Furthermore, should a contract be found to exist, the specific terms of the alleged contract, i.e., whether plaintiffs were to be paid for meal periods and whether the grievance procedure contained in §13 of the defendant's Personnel Manual was a term of this alleged contract, are also factual matters which are to be determined by the

jury. The court further finds that K.S.A. 60-512 is the applicable statute of limitations for plaintiffs' contract action. Head v. Knopp, 225 Kan. 45, 587 P.2d 867 (9178). However, the court further finds that determination of whether K.S.A. 60-512 bars plaintiffs' contract claims arising more than three years preceding the filing of plaintiffs' petition is premature at this junction. Accordingly, the court will deny defendant's motion for summary judgment in regard to plaintiffs' claim for breach of an implied contract of employment.

Finally, plaintiffs have moved the court for leave to file a cross motion for summary judgment out of time. Specifically, plaintiffs ask the court to consider their response in the alternative as a cross motion for summary judgment. In keeping

with the recognized objective of Rule 56 of the Federal Rules of Civil Procedure, i.e., to expedite the disposition of cases, the court will grant plaintiffs' motion to file a cross motion out of time. See C. Wright, A. Miller & M. Kane, Federal Practice & Procedure §2720, at 33. However, because the court has already determined that there are genuine issues of material fact, the court will deny plaintiffs' cross motion for summary judgment.

**IT IS BY THE COURT THEREFORE ORDERED** that the City of Shawnee's motion for summary judgment, or in the alternative for partial summary judgment, is denied in part and granted in part in accordance with this order.

**IT IS FURTHER ORDERED** that plaintiffs' motion to file a cross motion out of time is granted.

IT IS FURTHER ORDERED that plaintiffs' cross motion for summary judgment is denied.

DATED; This 4th day of October, 1990, at Topeka, Kansas.

DALE E. SAFFELS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| BILLY W. LAMON; PAUL E. PAGACSZ; RONALD W. WARD; DONALD FOLTZ; MICHAEL G. McCOY; LARRY EVANS; JOHN ENGLAND; MARK W. HEIN; DON B. GAMBLIN, JR.; FRANKLIN K. SULLIVAN; MARK A. ASHURST; PAUL F. ARNOLD; TERRY P. LAWSON; RANDY A. PEDDICORD; THOMAS F. CARNEY; | ) | CIVIL ACTION |
| Plaintiffs, | ) | |
| vs. | ) | No. 88-4200-S |
| CITY OF SHAWNEE, | ) | |
| Defendant. | ) | |

**VERDICT**

We, the jury, duly impaneled and sworn, upon oaths present the following answers to question submitted by the court:

(1) Are the plaintiffs entitled to recover under the Fair Labor Standards Act for their meal periods?

Yes X No ___

(2) Are plaintiffs Billy W. Lamon, Paul E. Pagacsz, Ronald W. Ward, Randy A. Petticord, Michael G. McCoy, and Mark A. Ashurst entitled to recover under the Fair Labor Standards Act for time spent prior to pre-shift briefing and time spent after post shift briefing working?

Yes ___ No X

(3) Did defendant establish a 28-day work period?

Yes X No ___

(4) If you answered "no" to question 3, did the defendant willfully violate the Act?

Yes ___ No ___

(5) Are any of the plaintiffs entitled to recover on their implied contract claim?

| | | |
|---|---|---|
| Plaintiff Billy Lamon | Yes ___ | No X |
| Plaintiff Paul E. Pagacsz | Yes ___ | No X |
| Plaintiff Ronald W. Ward | Yes ___ | No X |
| Plaintiff Donald Foltz | Yes ___ | No X |
| Plaintiff Michael G. McCoy | Yes ___ | No X |
| Plaintiff Larry Evans | Yes ___ | No X |
| Plaintiff John England | Yes ___ | No X |
| Plaintiff Mark W. Hein | Yes ___ | No X |
| Plaintiff Don B. Gamblin Jr | Yes ___ | No X |
| Plaintiff Franklin Sullivan | Yes ___ | No X |
| Plaintiff Mark A. Ashurst | Yes ___ | No X |
| Plaintiff Paul F. Arnold | Yes ___ | No X |
| Plaintiff Terry P. Lawson | Yes ___ | No X |
| Plaintiff Randy A. Peddicord | Yes ___ | No X |
| Plaintiff Thomas F. Carney | Yes ___ | No X |

10/22/90
DATE

James A. Latimer
FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

| | | |
|---|---|---|
| BILLY W. LAMON; PAUL E. PAGACZ; RONALD W. WARD; DONALD FOLTZ; MICHAEL G. McCOY; LARRY EVANS; MARK W. HEIN; DON B. GAMBLIN, JR.; FRANKLIN K. SULLIVAN; MARK A. ASHURST; PAUL F. ARNOLD; TERRY P. LAWSON; RANDY A. PEDDICORD; THOMAS F. CARNEY; | ) | CIVIL ACTION |
| Plaintiffs, | ) | |
| vs. | ) | No. 88-4200-S |
| CITY OF SHAWNEE, | ) | |
| Defendant. | ) | |

**MEMORANDUM AND ORDER**

This matter is before the court on motion of plaintiffs Billy W. Lamon, et al. for the award of damages. Also before the court is defendant's motion for a new trial or to alter, amend or vacate the judgment; or in the alternative for a judgment notwithstanding the verdict. This is a case

brought pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 et seq. ("FLSA"), and the Kansas Minimum Wage and Maximum Hour laws, K.S.A. 44-1201 et seq. On October 22, 1990, a jury verdict for plaintiffs was entered on the issue of compensability of meal periods under the FLSA. The jury further found that defendant had established a 28-day work period which partially exempts defendant from paying overtime compensation at a rate of one and one-half times plaintiffs' regular hourly wages for hours worked from 160 to 171 per 28-day work period.

**Plaintiffs' Motion for the Award of Damages**

The remaining issue before the court is what amount of damages are owed to plaintiffs. Upon examination of the parties' memoranda, the court finds that no hearing is necessary to resolve the issue of

damages. In its response to plaintiffs' "Statement of Damages," defendant continues to challenge the issue of liability for its failure to pay plaintiffs compensation for meal periods. The primary issue which defendant contests is whether meal periods are compensable under the FLSA when defendant has established a 28-day work period as found by the jury. Defendant argues that under the FLSA there is no requirement that plaintiffs be paid their rate of regular compensation for hours worked beyond 160 in a 28-day period. Defendant premises its argument on the fact that is has established a work period of 28 days, and the fact that defendant pays plaintiffs overtime compensation for hours worked beyond 171 hours in a 28-day period. Accordingly, defendant asserts that unless plaintiffs work 171 hours or more, the 11

hours between the 160 and 171 are not compensable under the FLSA. Defendant further argues that its failure to compensate plaintiffs for these hours is not a violation of the overtime provisions of the FLSA.

The court rejects defendant's interpretation of the law. Initially, the court notes that the FLSA was adopted by Congress as remedial legislation. Consequently, a restrictive interpretation of the FLSA is contrary to congressional intent. Hodgson v. University Tower Club, Inc., 466 F.2d 745, 746 (10th Cir. 1972) ("it must be liberally construed 'to apply to the furthest reaches consistent with congressional direction'" Id. (quoting mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207, 211 (1959)). Furthermore, the court finds direction in regulations

promulgated by the Department of Labor. As this court has stated before, the interpretation of an administrative agency charged with issuing regulations pursuant to a federal law has been held to be "entitled to great weight and the Court may properly resort to them for guidance." Wirtz v. Healy, 227 F.Supp. 123, 130 (N.D. Ill. 1964). See also Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

In looking to the relevant regulatory provisions, the FLSA requires compensation for meal periods, notwithstanding the defendant's adoption of a 28-day work period. The relevant regulatory provision provides in pertinent part:

> (b) Compensable hours of work generally include all of the time during which an employee is on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or

> permitted to work for the employer.

29 C.F.R. §553.221. Thus, any time spent working is compensable. Further direction may be found as follows:

> (b) If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during the meal period, and all the other tests in §785.19 of this title are met. (emphasis added).

29 C.F.R. §553.223. The jury specifically found that plaintiffs were not completely relieved of their duties during meal periods. Therefore, plaintiffs are entitled to compensation under the FLSA. The jury further found that defendant has established a 28-day work period; thus, the rate of compensation owed for these hours, although hours worked in excess of 40 per week, is at

plaintiffs' regular hourly rate.[1]

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[1] The court notes defendant's extensive briefing of its argument that there is no express requirement under the FLSA that plaintiffs be paid for the hours between 160 and 171 which are statutorily exempt from the normal requirement that these hours are compensable at an overtime rate. However, the court finds defendant's argument to be unreasonable in view of the remedial purpose of FLSA. The court finds the requirement that plaintiffs be paid compensation at their regular hourly rate to be implicit in the framework of the FLSA. The court further notes that defendant has conceded that if plaintiffs work more than 171 hours, hours worked between 160 and 171 are compensable at plaintiffs' normal hourly rate. The court finds there to be no principled reason for the requirement that plaintiffs work over 171 hours before they are entitled to be paid for time spent working between 160 and 171 hours.

Consequently, defendant has failed to compensate plaintiffs for their meal periods as required by the FLSA.

The court finds that plaintiffs' method of calculating the actual damages suffered by the police officers in this case is correct. Therefore, the actual damages to be awarded in this case can be calculated by the number of hours each plaintiff has not been compensated for meal periods, multiplied by each plaintiff's hourly rate of pay. Accordingly, the court adopts plaintiffs' statement of actual damages totaling $90,614.37, as calculated by their accountant Susan E. Tucker.

**Liquidated Damages**

In addition to actual damages, plaintiffs seek the award of liquidated damages in a sum equal to the amount of actual damages. Under 29 U.S.C. §216(b),[2] this court must award liquidated damages in addition to actual damages for violations of the FLSA. "The only instance where a court may exercise discretion in not awarding liquidated damages is when an employer shows that its action was in good faith and that

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[2] Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional amount as liquidated damages. . . . 29 U.S.C. §216(b).

it had reasonable grounds for believing the failure to pay overtime compensation was not a violation of the FLSA." Crenshaw v. Quarles Drilling Corp., 798 F.2d 1345, 1351 (10th Cir. 1986). Thus, unless the City of Shawnee demonstrates that its actions were in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of the Act, the court must award liquidated damages. The employer has the burden of demonstrating both elements. Doty v. Elias, 733 F.2d 720, 725-26 (10th Cir. 1984). If the employer cannot convince the court of both of these elements, an award of liquidated damages is mandatory. EEOC v. Shelby County Gov't. Bd. of County Comm'rs., 707 F.Supp. 969, 987 (W.D. Tenn. 1988) (quoting Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir.), cert. denied, 434 U.S. 1086 (1986)).

Although the issue of defendant's "good faith" is subjective, whether an employer had reasonable grounds for its actions is judged by an objective standard. Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982).

Upon review of the record in this case, the court finds that defendant has not met its burden of showing that it acted in good faith and had reasonable grounds for believing that its failure to compensate police officers for their meal periods did not violate the Act. First, the court finds that defendant had been advised by its attorney in a letter dated November 11, 1985, that meal periods were compensable regardless whether the defendant established a 28-day work period pursuant to 29 U.S.C. §207(k). In fact, the letter stated:

> It is our opinion that because the officer is subject to immediate call during his lunch period, that period is compensable whether the department selects 7(k) or not. The officer is not authorized to leave the City and must be ready to respond.

Evidence which defendant offers in support of its alleged good faith includes a memorandum from Police Chief Stump to Gary Montague dated January 9, 1986. In this memorandum, Police Chief Stump stated, "[i]t is the Department's opinion that by establishing a (sic) 'uninterrupted lunch break' and making every effort not to call the officer on his lunch break unless it is an emergency, this will surpass and meet the standards of the Fair Labor Standards Act." (Defendant's Exh. 411). However, in a memorandum from Major Hall to Police Chief Stump, dated January 17, 1986, Major Hall stated, "I also took the double precaution

of specifying a ½ hour lunch which I specifically neglected to state was paid. This would allow us to claim the 8½ hour work day was actually only 8 hours if we excluded the lunch period." (Defendant's Exh. 413). This statement indicates that defendant anticipated paying plaintiffs only eight hours for an eight and one-half hour work day. Thus, the court is unpersuaded that defendant exercised good faith in electing not to pay plaintiffs for their meal periods.[3]

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[3] Other evidence which the defendant offers in support of its good faith includes a letter from Ronald N. Dean, Assistant Regional Administrator for the Employment Standards Administration, Wage and Hour Division of the Department of Labor. Defendant's Response to Plaintiffs' Motion for Damages, Attachment 6. In this letter, Mr. Dean advises the City of El Dorado, Kansas, that "duty-free lunch periods may be deducted from compensable hours of work for law enforcement personnel for whom the 7(k) exemption is claimed." Defendant contends that Mr. Dean's letter indicates that it was the generally accepted conclusion that meal periods were not compensable. Defendant's argument misses the mark. This letter which defendant asserts demonstrates that meal periods were considered to be non-compensable if they are "duty-free" lunch periods. In this case, the jury found that plaintiffs' lunch periods are not "duty-free." Therefore, this letter does not offer support for defendant's position that it had acted in good faith reliance on such letter rulings.

Defendant further argues that it had a reasonable ground for believing plaintiffs' meal periods were not compensable. Defendant bases this assertion on its conclusion that much confusion initially surrounded the recently enacted §207(k) exemption for law enforcement officers. Defendant may be correct in this assertion. However, as stated by the Tenth Circuit Court of Appeals in Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726, 730 (10th Cir. 1984) (citations omitted), "[a]n employer's ignorance of the Act or its requirements is not a reasonable ground for believing that it was in compliance." Furthermore, in order for a court to exercise its discretion under 29 U.S.C. §260, the employer must convince the court that it acted in "good faith and that he had reasonable grounds for believing he did not

violate the Act." Id. Because the court is not convinced that defendant exercised good faith, and because the court finds that defendant's ignorance of the requirements of the Act is not a reasonable ground for believing it was in compliance, the court finds that defendant has failed to carry its burden of persuasion. Thus, the court must award plaintiffs liquidated damages in an amount equal to the actual damages suffered by plaintiffs ($90,614.37) pursuant to 29 U.S.C. §216(b).

**Attorneys' Fees and Costs**

Finally, plaintiffs seek the award of attorneys' fees and costs pursuant to Section 16(b) of the Act. This statutory provision provides:

> The court in such actions shall, in addition to any judgment awarded to the Plaintiff or Plaintiffs, allow a reasonable attorney's fee to be paid by

> defendant and costs of the action.

Thus, in accordance with this statutory provision, the award of attorneys' fees and costs is mandatory. See Wright v. U-Let-Us Skycap Serv., Inc., 648 F.Supp. 1216, 1218 (D. Colo. 1986). Discretion only exists in this matter in regard to the amount and the reasonableness of the fee. Birbalas v. Cuneo Printing Industries, Inc., 140 F.2d 826, 828 (7th Cir. 1944).

Initially, defendant asserts that plaintiffs have failed to comply with Local Rule 220 of the District of Kansas. This rule requires the moving party, the plaintiffs, to "first advise the court in writing that after consultation the parties are unable to reach an agreement with regard to the fee . . ." Rule 220 D. Kan. The court finds that although plaintiffs have

not technically complied with this rule, it is obvious from the letters of correspondence between the parties, copies of which accompany plaintiffs' reply, that they are unable to reach an agreement regarding the fee. Accordingly, the court will proceed to address plaintiffs' claim for attorneys' fees.

Defendant contends that plaintiffs are not the prevailing party. Plaintiffs are considered to be the prevailing party "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In this case, plaintiffs clearly have prevailed on the issue of compensability of meal periods. Moreover, the significance of the issue of compensation for meal periods is

demonstrated by the substantial amount of actual damages suffered by plaintiffs, as discussed supra. Accordingly, this court finds that the patrol officers are the prevailing parties, and therefore, are entitled to a statutory award of attorneys' fees.

Defendant seeks a reduction in the amount of attorneys' fees sought to be awarded to plaintiffs. In Hensley, 461 U.S. at 433, the Supreme Court addressed the issue of reasonable attorneys' fees recoverable pursuant to 42 U.S.C. §1988. Although plaintiffs seek attorneys' fees pursuant to 29 U.S.C. §216(b), this court finds Hensley to provide guidance. The Hensley Court stated that reasonable hourly rates times a reasonable number of hours equals a reasonable amount of attorneys' fees. Id. The Court then identified two

considerations which must be weighed to determine whether attorneys' fees are reasonable. Id. at 434. The first factor is the results achieved. Id. The second is whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" Id. Defendant contends once again that because plaintiffs did not prevail on all of their claims, they are not entitled to recover the total amount of attorneys' fees incurred while litigating their claims.

In Hensley, the Supreme Court recognized that in suits which involve a "common core of facts" that 'it [may be] difficult to divide the hours expended on a claim-by-claim basis." Id. at 435. Instead, the Court stated that the district court's focus should be directed to "the

significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Id. Applying this reasoning, the court finds the attorneys' fees which plaintiffs seek to recover are reasonable in terms of the hourly rates sought and the overall amount of time spent in litigating plaintiffs' claims. Initially, the court notes that this case does involve a "common core of facts." This common core revolves around the issue of overtime compensation for hours worked beyond a regular eight hour day. Further, the court finds that the distinct legal claims of plaintiffs under the Kansas Minimum Wage and Maximum Hour laws are essentially parallel claims to those under the FLSA. Moreover, the failure of plaintiffs to prevail on alternative legal grounds, i.e., breach of contract, does not

mean that plaintiffs' recovery of legal fees should be reduced. As stated by the Supreme Court, "[l]itigants in good faith may raise alternative legal grounds for a desired outcome . . ." Id. at 435. Indeed, plaintiffs have recovered for their meal periods on a different theory, i.e., under the FLSA. Accordingly, the court will award plaintiffs attorneys' fees as stated in Plaintiffs' Reply to Defendant's Response to Plaintiffs' Memorandum in Support of Damages, Exhibit C.

Finally, plaintiffs have moved the court to award costs in the amount of $9,330.91 pursuant to §216(b). Plaintiffs' request for costs include reproduction costs, court costs, and witness fees. Generally, "[c]osts under fee-shifting statutes such as the FLSA include all reasonable out-of-pocket expenditures."

Shorter v. Valley Bank & Trust Co., 678 F.Supp. 714, 726 (N.D. Ill. 1988) (citations omitted). The Tenth Circuit Court of Appeals has recognized that in actions in which the prevailing party may recover attorneys' fees pursuant to statute, the prevailing party may recover those reasonable "out-of-pocket costs not normally absorbed as part of law firm overhead. . . ." Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983).

The court finds that the amounts billed by plaintiffs' accountant, Susan E. Tucker, are reasonable costs necessarily incurred to determine the amount of damages recoverable by plaintiffs. The court further finds that the remaining costs incurred by plaintiffs, namely reproduction costs, court costs, witness fees and costs incurred in taking depositions are reasonably necessary and are

costs which would not normally be absorbed as overhead by law firms in this area. Thus, the court will award plaintiffs' requested amount of $9,330.91 as reasonable out-of-pocket costs pursuant to 29 U.S.C. §216(b).

**Defendant's Motion for a New Trial, to Alter or Amend the Verdict; or in the Alternative for Judgment Notwithstanding the Verdict**

Defendant has moved the court for a new trial, to alter or amend or vacate the judgment, or in the alternative, for a judgment notwithstanding the verdict. Rules 59(a) and (e) of the Federal Rules of Civil Procedure.

Generally, motions for a new trial are committed to the discretion of the district court. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984); Brownlow v. Aman, 740 F.2d 1476, 1491 (10th

Cir. 1984). In reviewing a motion for a new trial, the court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." McDonough Power Equip., 464 U.S. at 553. "[T]he party seeking to set aside a jury verdict must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence." White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983). The alleged trial court errors must be prejudicial and clearly erroneous, rather than harmless. Also, no error in the admission or exclusion of evidence, and no error in any ruling or order of the trial court or anything done or omitted by the court, can be grounds for granting a new trial unless the error or defect affects the substantial rights of the

parties. Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp., 571 F.2d 1144, 1148-49 (10th Cir.), cert. denied, 439 U.S. 862 (1978); Fed. R. Civ. P. 61.

Defendant contends that the trial court erroneously used an improper jury instruction. Specifically, defendant challenges the court's instruction No. 10 which states, "[t]o qualify as a bona fide meal period, the employee must be completely relieved from duty for the purposes of eating regular meals." Defendant is merely reasserting its previous arguments which were rejected in this court's Memorandum and Order filed October 4, 1990, which denied defendant's motion for summary judgment. The court once again rejects defendant's argument. This instruction utilized by the court is basically derived from the definition of a bona fide meal period

promulgated in 29 C.F.R. §785.19. Further, the court finds that this is the appropriate standard to determine whether plaintiffs are entitled to compensation for their meal periods under the FLSA. See Nixon v. City of Junction City, Kan., 707 F.Supp. 473, 479 (D. Kan. 1988); Wahl v. City of Wichita, 725 F.Supp. 1133, 1139 (D. Kan. 1988).

Defendants next contend that errors were made in instructions to the jury because "[i]nstructions No. 8, No. 10 and 12a are so inconsistent and contradictory that the jury had no opportunity to realize their proper role in deciding this case." Defendant's Memorandum in Support, Doc. 109, at 6. In evaluating defendant's arguments, the court must determine from "all that the jury heard and, from [the] standpoint of the jury, decide not whether the charge was faultless in every particular but whether it

had [an] understanding of its issues and its duty to determine the issues." White v. American Airlines, Inc., 915 F.2d 1414, 1420 (10th Cir. 1990) (quoting Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259, 1271 (10th Cir. 1988)).

The court notes that this is the first time that defendant has objected to instructions 8 and 12a. "Absent fundamental and highly prejudicial error, an unobjected to charge may not be disturbed, on motions for new trial." Stephenson v. College Misericordia, 376 F.Supp. 1324, 1326 (M.D. Pa. 1974). Nonetheless, the court will address defendant's arguments. First, defendant asserts these two instructions are inconsistent and the jury had no way of reconciling the two in order to determine what its duties were. The court finds that despite a slight inconsistency between

instructions 8 and 12a, the jury was provided with an ample understanding of the law, i.e., under the FLSA, meal periods are compensable if plaintiffs are found to be working. Moreover, any inconsistencies between instructions 8 and 12a were remedied by supplemental instructions given to the jury during their deliberations. Further, the court finds that such supplemental instruction did not 'coerce a verdict as to require a new trial." Copley v. Stone, 75 F.Supp. 203, 209 (W.D.S.C. 1947). In conclusion, the court finds that no prejudicial error was committed in the instructions given by the court. Thus, defendant's motion for a new trial, to alter or vacate the judgment will be denied.

In the alternative, defendant has moved the court to grant a judgment notwithstanding the verdict. In reviewing

a motion for judgment notwithstanding the verdict, the district court may grant the motion only if the facts and inferences in the case point so strongly and overwhelmingly in favor of one party that the court should find that reasonable persons could not arrive at a contrary verdict. Downie v. Abex Corp., 741 F.2d 1235, 1238 (10th Cir. 1984). That is, the question is not whether there exists no evidence supporting the party against whom the motion is directed, but whether there is any evidence upon which the jury could properly find a verdict for that party. K-B Trucking Co. v. Riss Int'l. Corp., 763 F.2d 1148, 1163 (10th Cir. 1985). Furthermore, in considering the motion, the trial judge must consider all the evidence and the reasonable inferences therefrom in the light most favorable to the party against whom the

motion is directed. Downie, 741 F.2d at 1238.

In viewing the evidence in the light most favorable to plaintiffs, the court finds that there is ample evidence in the record from which reasonable persons could conclude that plaintiffs' meal periods were compensable as work time. Evidence presented at trial by individual plaintiffs supports the conclusion, that although plaintiffs left their primary job responsibility, plaintiffs were subject to call and were subject to interruptions, so that they were no "completely relieved of duty" for purposes of the FLSA. Moreover, evidence was presented that some plaintiffs performed paper work for the defendant during their meal periods taken at the police station. Thus, the court finds that evidence exists in the record upon which a

reasonable trier of fact could find for the plaintiffs on the issue of compensability of meal periods.[4] Accordingly, the court will deny defendant's motion for a judgment notwithstanding the verdict.

**IT IS BY THE COURT THEREFORE ORDERED** that plaintiffs' motion for the award of damages, attorneys' fees, and costs is granted consistent with the findings contained in this memorandum and order.

**IT IS FURTHER ORDERED** defendant's motion for a new trial, to alter, amend or vacate the judgment, or in the alternative,

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[4] Defendant once again reasserts its argument that because defendants had adopted a 28-day work period, plaintiffs may not recover under the FLSA for hours worked in excess of 160 and less than 171 per 28-day period. The court once again rejects defendant's assertion.

for a judgment notwithstanding the verdict is denied.

DATED: This 3rd day of January, 1991, at Topeka, Kansas.

DALE E. SAFFELS
United States District Judge

INSTRUCTION NO. 10

Unless plaintiffs' meal periods are "bona fide" meal periods under the Fair Labor Standards Act, plaintiffs' meal periods are compensable work time. Bona fide meal periods are not work time. To qualify as a bona fide meal period, the employee must be completely relieved from duty for the purposes of eating regular meals. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.

13. Q. We pay ½ times for the officers on-duty for firing range qualification. It has been the Department's policy that those who failed to qualify in the allotted time are required to remain and reshoot until they qualify. The Department's policy is not to recompensate these people for the time, if we did they would all be missing the first round wanting to stay longer.

A. All officers must be compensated for hours worked to include mandatory training such as firing range qualification. You recourse for purposeful non-qualification does not include non-payment of hours worked.

14. Q. We currently allow an officer 30 minutes for lunch. This is included in his 8 hours of duty time. If during this lunch break he is called to respond, are we obligated?

A. Where the employer has elected to use the 7(K) exception, meal time cannot be excluded from compensable hours where the employee is on duty for less than 24 hours. (C.F.R. §553.15 Sleeping and Meal Time). If, however, the 7(K) exception is not elected, bona fide meal periods are not work

periods or compensable unless the employee is called to work. (C.F.R. §785.19 Meal). It is our opinion that because the officer is subject to immediate call during his lunch period, that period is compensable whether the department selects 7(K) or not. The officer is not authorized to leave the City and take lunch because of required duties would not be compensated time-and-a-half for the lunch period. If he worked 8½ hours and his total hours exceeded the number set for his work period he would receive overtime compensation.

As you can tell, many of the questions are difficult to answer in an abstract non-specific context. Pending litigation and legislation may drastically alter the requirements of the Fair Labor Standard Act in the future. We will keep you information of the information we become aware of. Please contact our office with questions or comments.

Marvin E. Rainey

Michael R. Santos

cc: Gary Montague

different, then show him book and page.

Q. Page 96, line 7, didn't you in fact testify, "When I feel an officer is going in for bank business, a loan, or something like that, he should do it on his own time, not on my company time. If he's doing it over his lunchtime, then he should do it, you know, on his own, not my uniform, because he represents the department.

"So is it your feeling by doing it in uniform it becomes your time instead of his time?

Answer: "Yes. That's not becoming a professional office." Did you so testify?

A. Yes.

Q. And is that still your belief, sir?

A. Yes, it is.

Q. Is an officer always on call or subject to duty even during his lunch?

A. During an emergency, if we have any emergency, he is.

Q. I show you, sir, your deposition at page 81, 82. Those questions refer, do they not, to Rule 4.1 to those rules and regulations?

MR. RAINEY: If it please the Court,

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WITNESS: HAYSELDEN

D/EXAM BY MR. YOUNGENTOB

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS

ALBERT L. BRINKMAN,
et al.,

Plaintiffs,

vs. Case No. 91-4208-C

THE DEPARTMENT OF
CORRECTIONS OF THE
STATE OF KANSAS,

Defendant.

**MEMORANDUM AND ORDER**

The case comes before the court on four motions: the defendant's motion to dismiss based upon principles from the Tenth and Eleventh Amendments (Dk. 18); the defendant's motion to dismiss (Dk. 42) premised on the doctrines of res judicata and collateral estoppel; and the defendant's motion (Dk. 44) and the plaintiffs' motion (Dk. 46) for summary judgment grounded on the lack of material facts to prevent entering judgment on the merits of the

plaintiffs' claims under the Fair Labor Standards Act of 1938 ("FLSA" of "the Act"), 29 U.S.C. §201 *et seq*. The motions will be decided *seriatim*.

**Defendant's Motion to Dismiss** (Dk. 18).

The defendant argues the FLSA's application to employees of a state correctional system impinges upon state sovereignty in violation of the Tenth Amendment. In effect, the defendant asks the court to resurrect a test from an overruled Supreme Court decision and to abrogate the FLSA's coverage of state and local government employees accordingly.

To trace the meandering path taken by the Supreme Court and Congress in making the FLSA applicable to state and local governments, the court will use as road maps two decisions from the Tenth Circuit, *Lamon v. City of Shawnee, Kansas*, Nos. 91-3053,

91-3068, 91-3216, and 91-3217, 1992 U.S. App. LEXIS 18281 (10th Cir. Aug. 10, 1992), and *Local 2203 v. West Adams Cty. Fire Protection Dist.*, 877 F.2d 814 (10th Cir. 1989). As enacted in 1938, the FLSA expressly exempted the states and their political subdivisions from its comprehensive remedial scheme that set a minimum wage and an overtime wage. 29 U.S.C. §203(d) (1940). Congress, in 1966, removed this exemption by including within the definition of "employer" the state or its political subdivisions operating certain schools, hospitals, nursing homes, railways or carriers. 29 U.S.C. §203(d) (1966). The Supreme Court in *Maryland v. Wirtz*, 392 U.S. 183 (1968), found this amendment constitutionally valid under the Commerce Clause. In 1974, Congress expanded the reach of FLSA to cover virtually all state and

local government employees. FLSA Amendments of 1974, 29 U.S.C. §203(d) and (x). Overruling *Wirtz*, the Supreme Court in 1976 invalidated FLSA's extension to state and local governments when those entities were performing traditional governmental functions. *National League of Cities v. Usery*, 426 U.S. 833, 851-52, 96 S.Ct. 2465, 2474, 49 L.Ed.2d 245 (1976). The Court believed that Congress' authority under the Commerce Clause could not be wielded so as to deny effectively the States; sovereign existence. *Id.* at 851-52. Overruling itself again, the Supreme Court rejected, "as unsound in principle and unworkable in practice," the "integral" or "traditional" governmental test established in *Usery*. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985). Out of "[d]ue respect for the reach of congressional power

within the federal system," *Garcia* majority believed that the political process provided an adequate check on Congress' exercise of Commerce Clause power and that this check displaced any constitutional need for articulating limits on this power in this setting. 469 U.S. at 556-57. To cushion the blow from the Act's revived application, Congress gave state and local employers a grace period running to April 15, 1986, before the Act became applicable to them. Federal Labor Standards Amendments of 1985, Pub. L. No. 99-150 (1985).

Defendant asks the court to resurrect the test from *Usery* arguing the Supreme Court in *Gregory v. Ashcroft*, 501 U.S. ___, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), dealt a blow to *Garcia*. The *Gregory* decision certainly reaffirms much of the federalism principles espoused in *Usery*. It

also adopts a plain statement rule for use in deciding whether Congress actually intended to override a state's sovereign powers. The court found no clear and manifest statement that the Age Discrimination in Employment Act was intended to cover appointed state judges. Even so, the Court expressly acknowledged *Garcia* and said it was avoiding any decision on whether Congress had exceeded its authority under the Commerce Clause and was deciding only whether Congress had exercised that authority.[1] The Court in *Gregory* did

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[1] For good reason, the defendant does not cite *Gregory* nor argue for the proposition that the FLSA lacks a plain statement that employers, such as the defendant, are covered by it. At 29 U.S.C. §207(k), the FLSA creates special standards for public agencies with employees engaged in "fire protection activities or . . . law enforcement activities (including security personnel in correctional institutions)."

not question the precedential force of *Garcia* but simply worked around it. The defendant may have cause to wish and hope that *Gregory* is a harbinger of *Garcia's* overruling, but this court has no concrete basis for concluding that *Garcia* is not controlling here. The FLSA's coverage of employees of state correctional system does violate the Tenth Amendment. *See Renfro v. City of Emporia, Kan.*, 948 F.2d 1529, 1541 (10th Cir. 1991), *cert. dismissed*, 112 S.Ct. 1310 (1992); *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 962 (1991).

The defendant's next constitutional volley is the Eleventh Amendment. Congress may override the States' Eleventh Amendment immunity in the exercise of its Commerce Clause power. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15 (1989) (plurality

opinion); *see id.* at 57 (White, J. concurring in the judgment). This is accomplished only when Congress' intent to do so is manifested in "unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985).

On two recent occasions, the Ninth Circuit has rejected Eleventh Amendment challenges to the FLSA, *Hale v. State of Ariz.*, 967 F.2d 1356 (9th Cir. 1992); and *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1323-24 (9th Cir. 1991). In a somewhat surprising decision, not cited by either side, a federal district court in New Mexico held that the Eleventh Amendment barred an action by corrections officers against the New Mexico Corrections Department. *AFSCME v. Corrections Dept. of State of N.M.*, 783 F.Supp. 1320 (D.N.M.

1992). The federal judge there gleaned an exacting standard from the relevant Supreme Court decisions and concluded that the FLSA fell short of it. 783 F.Supp. at 1324-26. This court is not persuaded by this precedent within the Tenth Circuit principally because the judge did not consider the effect of the 1985 amendment which gave the states until April 15, 1986, to conform to FLSA procedures. Pub.L. No. 99-150, 99 Stat. 787 §2(c)(1) (1985), 29 U.S.C. §216 (historical note) (1988). This 1985 amendment, read in conjunction with 29 U.S.C. §§ 203(x) and 216(b), is unequivocal, textual evidence of Congress' intent to abrogate the States' Eleventh Amendment immunity. *See Hale*, 967 F.2d at 1362; *Gilbreath*, 931 F.2d at 1324.

**Defendant's Motion to Dismiss** (Dk. 42). Calling upon the doctrines of res

judicata and collateral estoppel, the defendant argues the plaintiffs are bound by a prior state court decision on the issue whether their meal times are compensable. The defendant also seeks leave to amend its answer to add these affirmative defenses of collateral estoppel and res judicata. The plaintiffs contend the defendant has waived these defenses and the court should deny it leave to add them. Since the filing of the plaintiffs' memorandum in opposition, the parties have submitted an agreed pretrial order which was signed and filed by the court on August 31, 1992. The affirmative defense of res judicata appears, without reservation or objection, in the pretrial order as one of the defendant's contentions and as one of the issues of law. As evidenced by the pretrial order, the plaintiffs have dropped their objections to

the defendants' addition of this affirmative defense, and the issue of res judicata is properly before the court.

In deciding a motion to dismiss, the court must accept as true on their face the well-pleaded factual allegations of the complaint, and all reasonable inferences are made in favor of the plaintiffs. *Shaw v. Valdez*, 819 F.2d 965, 968 (10th Cir. 1987). Dismissal is appropriate only if it appears beyond a reasonable doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In ruling on a rule 12(b)(6) motion, the court may not consider material beyond the pleadings unless it is submitted or attached as part of the complaint. *Hal Roach Studios v. Richard Feiner and Co.*, 883 F.2d 1429, 1441 n. 18

(9th Cir. 1989). If extraneous matters are submitted by either side and accepted by the court, the motion must be converted into one for summary judgment. *Torres v. First State Bank of Sierra County*, 550 F.2d 1255, 1257 (10th Cir. 1977). Upon conversion of the motion, "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

The defendant's motion to dismiss is flawed for any number of reasons. The merits of the motion cannot be decided from the face of the pleadings. Nor has the defendant submitted as exhibits the complaint or orders from the prior state court action. Nor has the defendant applied in any meaningful way the doctrines to the facts and issues of the prior state court action and the current federal action.

While pointing to the state district court's holding that the officer's meal periods were not compensable, the defendant does not say what legal or factual theories were alleged or decided there. While identifying those persons who were parties to both suits, the defendant avoids saying the restrictions on the officers' meal periods have not changed since 1986.

The plaintiffs have submitted the memorandum decision filed September 26, 1989, and the journal entry of dispersal filed June 29, 1990, in the District Court of Shawnee County, Kansas, in the case of *Turner v. State of Kansas*, No. 86-CV-831. The suit was filed by a class consisting of "correctional officers of the Kansas Department of Corrections who, between the period of time from June 11, 1981, to June 11, 1986, worked five days per week and were

required to be present at the institution to which they were assigned more than forty hours per week." The plaintiffs alleged the defendants breached their employment contract evidenced by a personnel manual and employee manual in not paying them overtime for their preliminary and postliminary time. The issue of lunch breaks was raised by the defendants:

> The defendants further claim that though corrections officers at KSIR [Kansas State Industrial Reformatory] worked shifts of up to eight and one-half hours in length, they were allowed a thirty minute lunch break which offsets all of their preliminary and postliminary time.

(emphasis added). The state court rejected the plaintiffs' position that the lunch periods were compensable time. The state court reached this conclusion after considering a FLSA case from the Sixth Circuit, *Hill v. United States*, 751 F.2d 810

(6th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985), and a breach of collective bargaining agreement case from the Kansas Supreme Court, *Atteberry v. Ritchie*, 243 Kan. 277, 756 P.2d 424 (1988). The state court limited its analysis to the facts concerning KSIR officers' meal periods and did not suggest or hold that the same analysis would apply to correction officers in other state institutions.

The doctrine of res judicata or claim preclusion is to prevent the recurrent litigation of "'issues that were or could have been dealt with in an earlier litigation.'" *Northern Natural Gas Co. v. Grounds*, 931 F.2d 678, 681 (10th Cir. 1991) (quoting *Angel v. Bullington*, 330 U.S. 183, 193 (1947)). The plaintiffs contend, the defendant do not refute, and it appears correct that the plaintiffs could not have

litigated in the state court a FLSA meal time claim for the period from June 1, 1981 through June 1, 1986, as the FLSA did not become applicable to the States until April 15, 1986. The plaintiffs are not asserting here any claim for the period between April 15, 1986 and June 1, 1986. Therefore, the plaintiffs' FLSA claim could not have been raised in the state court action.

The alleged identity between the state court issues and the federal court issues has not been demonstrated by the defendant. Though both actions implicate some common policies, the standards enunciated and applied by the state court are arguably not congruent with the literal standards of the FLSA. More importantly, it cannot be overlooked that the state court decided the meal period issue only in regards to correction officers at KSIR while the

plaintiffs here are corrections officers at Lansing Correctional Facility. Before res judicata could bar the same type of claims against the same defendants for similar conduct occurring at a later time, the court must evaluate the factual matters occurring since the first action and judgment. *See People of the Sate of Cal. v. Chevron Corp.*, 872 F.2d 1410, 1415 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990). The court has no basis in the record for concluding or even assuming that the meal period restrictions relevant to correction officers at KSIR during the 1981 through 1986 period are the same ones relevant to correction officers at Lansing during the period from 1988 to the present. The defendant has failed to show that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief.

**Cross-Motions for Summary Judgment** (Dks. 44 and 46)

If no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law, the court shall grant a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). An issue of fact is "genuine" if the evidence is significantly probative or more than merely colorable such that a jury could reasonably return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. The issue also must be based on a viable legal theory in order to be "genuine." *Windon Third Oil and Gas v. Federal Deposit Ins.*, 805 F.2d 342, 346 (10th Cir. 1986), *cert. denied*, 480 U.S. 947 (1987)). An issue of fact is "material" if proof of it might affect the outcome of the lawsuit. *Anderson*, 477 U.S. at 249. In

effect, the inquiry on a summary judgment motion is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

The movant's burden under Fed. R. Civ. P. 56 is to specify those portions of the record which demonstrate the absence of a genuine issue of fact under the relevant substantive law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). It may be sufficient for the movant to establish that the alleged factual issues are without legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987). Summary judgment will be granted when the movant is able to show it is entitled to judgment as a matter

of law based upon the uncontroverted, operative facts.

The opposing party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts that show a genuine issue for trial remains and that are supported by the kinds of evidentiary materials listed in Rule 56(c). *Anderson*, 477 U.S. at 250. Because its evidence is deemed true and all reasonable inferences are drawn in its favor, the opposing party need come forth with only such evidence from which a fair-minded jury could return a verdict for it. *Windon*, 805 F.2d at 346.

More than a "disfavored procedural shortcut," summary judgment is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.' Fed. R. Civ. P. 1." *Celotex Corp. v. Catrett*, 477 U.S. at 327. At the

same time, a summary judgment motion is not the chance for a court to act as the jury and determine witness credibility, weigh the evidence, or decide upon competing inferences. *Windon*, 805 F.2d at 346. Cross-motions for summary judgment do not excuse the court from its task in deciding whether genuine issues of material fact exist. *Missouri Pac. R. Co. v. Kansas Gas & Elec. Co.*, 862 F.2d 796, 799 (10th Cir. 1988).

For purposes of these motions, the court will accept the following facts as uncontroverted:

The plaintiffs are corrections officers at the Lansing Correctional Facility assigned to one of four shifts covering the twenty-four hour day. Their time/payroll records reflect they work regular forty-hour weeks. The plaintiffs, however, are among

the officers who are required to report to roll call fifteen minutes before the scheduled shift and spend approximately fifteen minutes after the shift providing relief briefings. To offset this thirty minutes of extra work time, the plaintiff officers are given a thirty-minute break period which is not counted as hours worked on time sheets and is not calculated as part of any compensation. The plaintiffs allege this break is not a bona fide meal period and, therefore, is compensable work time for which they should be paid at a rate of one and one-half times their regular hourly wage.

While on their thirty-minute break, the plaintiff correction officers are subject to a number of restrictions. Breaks are to be taken during the middle six hours of a shift. Two break rooms are available. The

time it takes them to walk from their post to the break room is part of their break time. They are required to record when they leave for and return from break. They must remain in uniform. They are not permitted to leave the grounds of the facility or to visit their automobiles at their own discretion. They may not move from their assigned compound to another without permission. They may walk immediately outside the compound. They are not allowed to take breaks at their duty posts or to contact other officers who are not on break. They are not allowed to bring reading material identified as "contraband" into the break room. They are subject to recall for emergency alarms, and if they become aware of an alarm then they are expected to respond. They may be disciplined for not reporting when recalled during break.

Officers are expected both to report any inmate violations and to intervene in any inmate disturbances that are observed during break. Outside visitors, such as family members, are not allowed inside or outside the facility.[2]

The FLSA requires employers to pay overtime to employees for the time worked in excess of forty hours per week. 29 U.S.C. §207(a).[3] A definition of "work" is not

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[2] There are other restrictive circumstances that the plaintiffs submit exist, but they are controverted. Judgment may be entered as a matter of law only if sustained by the uncontroverted facts. Factual disputes that are immaterial under the substantive law do not preclude summary judgment. *See Renfro v. City of Emporia, Kan.*, 948 F.2d 1529, 1533 (10th Cir. 1991).

[3] The FLSA gives a state or local government the option of complying with the maximum hour and overtime provisions of §207(a)(1) or of adopting a work period scheme pursuant to §207(k) for its employees engaged in fire protection or law enforcement. It would appear that the defendant in this case has chosen to comply with the provisions of §207(a)(1).

found in the FLSA. Filling this void, the courts have come up with this basic definition: "'physical or mental exertion (whether burdensome or note) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" *Renfro v. City of Emporia, Kan.*, 948 F.2d at 1536 (quoting *Tennessee Coal Co. v. Muscoda Local*, 321 U.S. 590, 598 (1944)).[4] The

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[4] The Supreme Court has recognized that work does not require exertion, for a person can be employed to do nothing:

> Of course, an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness

courts have built upon this definition certain tests for determining if on-call time is compensable under FLSA. *Renfro*, 948 F.2d at 1536. The central question raised by the case *sub judice* is whether the test for deciding if a meal period is compensable under FLSA should be exclusively the literal application of a relevant regulation[5] or

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to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer's benefit or for the employee's is a question dependent upon all the circumstances of the case.

*Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).



should include the fundamental principles of FLSA embodied in the definition of "work" developed by case law.

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[5] Part 785 of Title 29 of the Code of Federal Regulations "discusses the principles involved in determining what constitutes working time." 29 C.F.R. §785.1. Section 789.19(a) specifically addresses meal breaks:

> Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

(citations omitted).

Other federal district courts in Kansas have heard claims that meal periods are compensable under FLSA. *Armitage v. City of Emporia, Kan.*, 782 F.Supp. 537 (D. Kan. 1992) (J. Kelly) (City police department detective), *appeal pending* (10th Cir.); *Lamon v. City of Shawnee, Kan.*, 754 F.Supp. 1518 (D.Kan. 1991) (J. Saffels) (City police officers), *aff'd in part and rev'd in part*, Nos. 91-3023, 3068, 3216, 3217 (10th Cir. Aug. 10, 1992); *Wahl v. City of Wichita, Kan.*, 725 F.Supp. 1133 (D. Kan. 1989) (J. Kelly) (City police officers); *Nixon v. City of Junction City, Kan.*, 707 F.Supp. 473 (D. Kan. 1988) (J. O'Connor) (City police officers). In each case, the court used primarily the completely relieved of duty

standard set forth in the regulation §785.19 and concluded that the officers' lunch periods were compensable as work time. Relying principally on the law and facts from these four decisions, the plaintiffs contend they are entitled to summary judgment.

The Tenth Circuit recently placed in doubt much of this district's case law on the meal period test under FLSA.[6] In

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[6] See footnote 11.

*Lamon*, the plaintiffs were police officers employed under a 28-day work period scheme available under §207(k). The court found these to be the relevant circumstances of the meal periods:

> An officer's ½-hour meal period begins once the officer arrives at a luncheon location and reports "10-10" to the dispatcher, signifying the suspension of patrol duty. During meal periods, officers are relieved of their patrol assignments, but are subject to call and are required to leave a telephone number where they can be reached or to monitor a portable radio. While on meal break, an officer must respond to emergency calls or personnel shortages if instructed to do so. An officer is relieved of patrol duties during meal time but retains some responsibilities, including: responding to citizen requests or inquiries, responding to crimes committed in the officer's presence and acting in a responsible and professional manner. Officers may take their meal periods at any location within the City or, with approval, out side the City at their homes or at restaurants if

> in close proximity to the City. The officers may not conduct personal business errands during the ½-hour period, such as picking up laundry at the cleaners, getting a haircut or grocery shopping.

*Lamon*, slip op. at 6-7 (record citations omitted). The jury returned a verdict in favor of the plaintiffs' claim for compensation of meal periods under FLSA. The defendant City appealed arguing the court erred in denying its motion for directed verdict and in instructing the jury on the claim.

The Tenth Circuit first held that the trial court did not err in submitting the claim to the jury for there was sufficient evidence upon which a reasonable factfinder could have returned a verdict for the plaintiffs. As to the jury instruction issue, the Tenth Circuit found error, reversed, and remanded for a new trial.

The district court's instruction on meal periods repeated much of the critical language from 29 C.F.R. §785.19. The Tenth Circuit said the district court should have looked instead to 29 C.F.R. §553.223(b).[7]

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[7] Section 553.223(b) reads:

> If a public agency elects to use the section 7(k) exemption, the public agency may, in the case of law enforcement personnel, exclude meal time from hours worked on tours of duty of 24 hours or less, provided that the employee is completely relieved from duty during meal period, and all the other tests in §785.19 of this title are met. On the other hand, where law enforcement personnel are required to remain on call in barracks or similar quarters, or are engaged in extended surveillance activities (e.g., "stakeouts"), they are not considered to be completely relieved from duty, and any such meal periods would be compensable.

29 C.F.R. §553.223(b) (emphasis added).

The Tenth Circuit believed this specific regulation, rather than the general meal period regulation of §785.19, was controlling of a compensability question of meal periods in the subsection (k) context. *Lamon*, slip op. at 25. In contrasting §785.19 and §553.223(b), the Tenth Circuit found two differences which were important in its mind. First, §553.223(b) did not include the following sentence from §785.19: "The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating."* The

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* The Tenth Circuit believed this distinction important even though §553.223(b) expressly adopts the completely relieved from duty standard "and all the other tests in §785.19." *Cf. Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1477 (11th Cir. 1990) (Because §553.223(d) incorporated the tests of §785.19, the court applied the tests from the latter regulation).

other was the illustrations found in §553.223(b) of a meal period being compensable when a law enforcement officer is forced to remain on call in barracks or is assigned to extended surveillance.[9] The

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[9] The court does not explain the significance of this point. In *Lee v. Coahoma County, Miss.*, 937 F.2d 220, 225 (5th Cir. 1991), cited by the *Lamon* panel, the Fifth Circuit noted that the facts of the claim before it did not "resemble this example." In *Leahy v. City of Chicago*, 785 F.Supp. 724, 727 (N.D. Ill. 1992), also cited by the *Lamon* panel, the district court noted that the illustrations used by the two regulations were "radically different" and that its case was not analogous to the one used in §553.223(b). The courts in *Lee, Leahy,* and *Lamon* seem to read into the illustration of §553.223(b) that the employee must be performing the same or similar kind of substantial duties over the meal period before compensation is due. These courts have attached more significance to the illustrations than was intended apparently by the Department of Labor. For at 29 C.F.R. §785.1, it states:

Tenth Circuit concluded that the "completely relieved from duty" standard under §553.223(b) means:

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> The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted.

At best, the example at §553.223(b) illustrates a common situation for §207(k) employees and does not suggest a different meaning for the "completely relieved from duty" standard.

Hence, a police officer must primarily be engaged in work-related duties during meal periods to warrant compensation therefor. That a police officer is on-call and has some limited responsibilities during meal periods does not perforce mean the officer is working. (citations omitted). Instead, consistent with the language of §553.223(b) and with traditional principles underlying FLSA, a law enforcement employee is completely relieved from duty during a meal period, for purposes of §553.223(b), when the employee's time is not spent predominantly for the benefit of the employer. (citations omitted). If during meal periods a police officer's time and attention are primarily occupied by a private pursuit, presumably the procurement and consumption of food, then the officer is completely relieved from duty and is not entitled to compensation under FLSA. Conversely, a police officer is entitled to compensation for meal periods if the officer's time or attention is taken up principally by

> official responsibilities that prevent the officer from comfortably and adequately passing the mealtime.
>
> As literally extracted from §785.19, the trial court's instruction no. 10 deprived the jury of an ample understanding of the issues and standards of the case. The instruction countenanced the misapprehension that the performance of <u>any</u> official duty, no matter how insignificant, during meal periods rendered the time compensable. We reject that result.

*Lamon*, slip op. at 26-28 (footnotes omitted) (emphasis in original).

The plaintiff correction officers were not covered by a §207(k) scheme; therefore, the choice exists to ignore the *Lamon* decision as limited to §553.223(b). In fact, the Tenth Circuit specifically restricted it interpretation to the "completely relieved from duty" standard appearing in §553.223(b). *Lamon*, slip op.

at 28 n. 18. For several reasons, this court in good conscience cannot ignore *Lamon*'s precedential weight. The reasons become apparent after reading a footnote in *Lamon*:

> In coming to this conclusion, we note that our interpretation of the "completely relieved from duty" standard only applies to that phrase as used in §553.223(b). For that reason, with respect to the application of the "completely relieved from duty" standard in *Wahl v. City of Wichita*, 725 F.Supp. 1133 (D. Kan. 1989) and *Nixon v. City of Junction City*, 707 F.Supp. 473 (D. Kan. 1988), both of which relied on §785.19 in ruling that meal periods of police officers were compensable, we make no comment, except for noting the following. While both decisions adhered to a "completely relieved from duty" standard, the court in *Wahl*, after citing the predominant benefit test, stated: "What matters in meal period cases is whether the employee is subject to real limitations on his personal freedom which inure to the benefit of his employer." 725 F.Supp. at 1144. In *Nixon* the court found that the plaintiff

> police officers in that case performed "substantial duties" during their lunch periods. 707 F.Supp. at 478. Moreover, our contrasting of the two sections, §553.223(b) and §785.19, does not mean that the "completely relieved from duty" standard as used in the latter section should necessarily take on a different meaning than that of the former section. *See, e.g., Hill v. United States*, 751 F.2d 810, 813-14 (6th Cir. 1984) (applying predominant benefit test to meal periods of letter carrier under §785.19).

*Lamon*, slip op. at 28 n. 18 (emphasis added). Despite professing a narrow ruling, the panel extracted from *Wahl* and *Nixon*, two §785.19 cases, some language indicative of the predominant benefit test. More importantly, the panel ended by contradicting in a single statement its earlier analysis distinguishing the two regulations.

This court believes *Lamon* strongly implies that the "completely relieved from

duty" standard appearing in both §553.223(b) and §785.19 has the same meaning. The two distinctions observed between §553.223(b) and §785.19 are insubstantial reasons for reading identical words differently in almost indistinguishable contexts. No rationale for having a less rigorous meal period standard for an employee covered under §207(k) is offered in *Lamon*. Section 207(k) obviously is intended to address the unique employment circumstances of a law enforcement officer, firefighter, or corrections officer. Presumably, the same circumstances justify taking the same approach to meal period times for those similarly employed whether covered by §207(k) or not. The court feels compelled to apply the standards articulated in *Lamon* to this case.

What the Tenth Circuit did in *Lamon* was to remind us that the regulatory standard,

"completely relieved from duty," cannot be applied singularly or be divorced from the traditional principles underling FLSA.[10]

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[10] Administrative regulations "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Who predominantly benefits from how an employee spends his time is the overriding question of whether the employee is working. Simply because the employee may be on-call and retain some other duties over his lunch period does not by perforce require compensation. *Lamon*, slip op. at 26 (citing *Lee v. Coahoma County, Miss.*, 937 F.2d 220, 225 (5th Cir. 1991) (Meal periods found not compensable for deputies which "were allowed to go where they pleased during the break, would only radio out once they reached the place where they wished to eat and were called back only in an occasional emergency."), and *Leahy v. City of Chicago*, 785 F.Supp. 724, 727 (N.D. Ill. 1992) (Police officers' meal periods found not compensable even though officers were required to remain within assigned district; to carry weapon and remain in uniform, to

report meal locations; to terminate meal period if assistance needed, answers needed, or instructions to be followed; to take lunch with patrol partner; to refrain from playing golf, reading non-department material, resting or napping, or consuming alcoholic beverages; to respond to citizen requests for assistance or information; to remain in radio contact and respond to calls; and to respond to citizen or police emergencies)). If the employee spends his lunch time primarily concerned with personal pursuits, such as relaxing and consuming food, then the employee has been "completely relieved from duty." *Lamon*, slip op. at 27. On the other hand, the employee is not "completely relieved from duty" when the lunch period principally involves the performance of official responsibilities

that prevent a comfortable and adequate lunch period.[11] *Id.*

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[11] As the Tenth Circuit did, one can find passing references in *Nixon* and *Wahl* to the predominant benefit test. For example, in *Nixon*, the observation that the officers were performing substantial duties over the meal period was made only after the court concluded that:

> By remaining available for calls, the officers are not completely relieved of duty. (citation omitted). Additionally, as a practical matter, the officers must remain in uniform and armed during their lunch periods and must continue to perform the duties that they perform throughout their shift, *i.e.*, observing, being observed, and responding to emergencies, crimes and citizens. Thus the officers are not completely relieved of duty. Although they may infrequently be required to take affirmative action during their lunch periods, the court has determined that these officers are nevertheless on duty during lunch periods simply because they are required to take appropriate action whenever the need arises.

Some courts have addressed what duties assumed by a security guard during the meal period rise to the level of work. In *Agner v. United States*, 8 Cl. Ct. 635 (1985), *aff'd*, 795 F.2d 1017 (Fed. Cir. 1986), the plaintiffs were members of the police force assigned to the Library of Congress. The United States Claims Court granted summary judgment for defendant on the strength of an earlier decision holding that "'the mere fact that an employee is required to eat lunch on the employer's premises and to be

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707 F.Supp. at 478. One can find similar statements in *Wahl*, 725 F.Supp. at 1141-1144. In both cases, the court held as a matter of law that the employer predominantly benefitted from the meal period principally because the employee remained on-call. The Tenth Circuit in *Lamon* expressly rejects the notion that on-call duty over a meal period by perforce means compensation is due. The Tenth Circuit, instead, favors the case-by-case analysis employed in the on-call time cases. Bound to follow Tenth

on a duty status, subject to emergency call during such period, does not convert this private leisure time into compensable time.'" 8 Cl. Ct. at 638 (quoting *Baylor v. United States*, 198 Ct. Cl. 331, 364 (1972)). Another line of cases have found meal breaks compensable if the guards remained on -call and subject to certain restrictions which

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Circuit precedent, *U.S. v. Spedalieri*, 910 F.2d 707, 709 n. 2 (10th Cir. 1990), this court has no reason to compare and contrast the facts of this case with those in *Nixon, Wahl*, and *Armitage*.

ensured their availability in the event of emergency. *See, e.g. Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir.), *cert. denied*, 344 U.S. 866 (1952); *Banks v. Mercy Villa Care Center*, 225 Neb. 751, 407 N.W.2d 793 (1987); *Lindell v. General Electric Co.*, 44 Wash.2d 386, 267 P.2d 709 (1954). Even in this line of cases, the court were concerned with whether the duties actually performed over the meal period were substantial, were the same as the guards' work duties, and interfered with the private pursuit of lunch. All of these cases put the focus on whether the time spent during the lunch period predominantly benefits the employee or the employer.

The defendant contends the only real limitation on the plaintiffs' meal period, supported by reliable evidence, is the geographic restriction to the prison

facility put in place to maintain the prison's integrity and to prevent the introduction of contraband. In contrast, the plaintiffs consider themselves tethered to the facility while facing significant and substantial restrictions on their actions ad speech all for the benefit of the defendant having a ready and functioning security staff.

After reviewing the record carefully, the court believes genuine issues of material fact exist barring the entry of summary judgment for either side. While the uncontroverted facts identified above demonstrate a solid case for the plaintiffs, the court does not believe it is in a position to say as a matter of law that the meal breaks predominantly benefit the defendant. This determination will require a better understanding of the nature and

extent of the asserted restrictions, considering the parties' agreement, appreciating the relationship between the duties performed at work and assumed or suffered on break, and knowing all relevant surrounding circumstances. *Renfro v. City of Emporia*, 948 F.2d at 1537. Among the factual issues are the existence and extent of any restrictions on discussing union or political matters or in reading certain literature or materials; the defendant's knowledge and tolerance of some plaintiffs' carrying and monitoring their radios during break; the nature and extent of the plaintiffs' continued observation of prisoners while on break; the relationship that these monitoring and observing duties bear to the plaintiffs' principal work activity; the availability of sleeping on break considering any rules or other

prohibitive circumstances; the frequency of emergency calls interrupting break; and the consistency with which these meal breaks were given. These issues are central in deciding whether during the meal periods the plaintiffs were primarily occupied by their relaxation and consumption of food or were performing substantial duties that prevented their comfort and enjoyment. Who predominantly benefits from the plaintiffs' meal breaks is a question that is answered only after balancing all relevant circumstances and assessing the credibility of widely varying accounts of the plaintiffs' freedoms and restrictions. The court must leave that responsibility to the finder of fact.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss (Dk. 18) is denied;

IT IS FURTHER ORDERED that the defendant's motion to dismiss (Dk. 42) is denied;

IT IS FURTHER ORDERED that the defendant's motion for summary judgment (Dk. 44) and the plaintiffs' motion for summary judgment (Dk. 46) are denied;

Dated this 14th day of September, 1992, at Topeka, Kansas.

Sam A. Crow, U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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| BILLY LAMON, et al., | ) | |
| | ) | |
| Plaintiffs - Appellants/ Cross-Appellees, | ) | |
| | ) | |
| v. | ) | Nos. 91-305[illegible] |
| | ) | 91-306[illegible] |
| CITY OF SHAWNEE, KANSAS, | ) | 91-321[illegible] |
| | ) | 91-321[illegible] |
| Defendant - Appellee/ Cross-Appellant. | ) | |

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ORDER

Entered September 14, 1992

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Before McKAY, BARRETT, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, and PARKER, District Judge.*

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*The Honorable James A. Parker of the United States District Court f the District of New Mexico, sitting by designation.

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This matter comes on for consideration of plaintiffs-appellants/ cross-appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denie by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc,



BEST AVAILABLE COPY

Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: _____
Patrick Fisher
Chief Deputy Clerk